92-1167

Supreme Court, U.S.
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No. 92-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

GERALD D. BUSH,
PETITIONER,

v.

ZEELAND PUBLIC SCHOOLS,

MICHIGAN STATE TENURE COMMISSION,
STATE OF MICHIGAN,
RESPONDENTS,

PRO SE PETITION FOR A WRIT OF CERTIORARI FROM THE MICHIGAN SUPREME COURT

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80 pp

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PRO SE PETITION FOR A WRIT OF CERTIORARI FROM THE MICHIGAN SUPREME COURT

Petitioner Gerald D. Bush respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Supreme Court entered on July 31, 1992.

OPINIONS BELOW

The majority (4) and dissenting (1) opinions of the Michigan Teacher Tenure Commission (TC) (Appendix [App.] A, 1a, 17a). A second decision of the TC on Petitioner's *pro se* Motion for Rehearing (App B, 21a). The reversing decision of the Ottawa County Circuit Court (OCCC) and denial of Cross Appeal (App C, 24a-35a). A majority (2 to 1) decision by the Michigan Court of Appeals (MCA) not to grant leave to appeal. (App D, 36a). MCA Motion for Reconsideration denied (2 to 1). (App E, 37a) The Michigan Supreme Court (MSC) denied Petitioner's *pro se* Motion for Leave to Appeal. (App F, 38a) It

also denied Petitioner's timely *pro se* Motion for Reconsideration on July 31, 1992 (App G, 39a).

JURISDICTION

A timely *pro se* appeal for Leave to Appeal to the Michigan Supreme Court was denied on April 24, 1992. A timely Motion for Reconsideration was denied by the Michigan Supreme Court on July 31, 1992. On October 23, 1992, Associate Justice John Paul Stevens granted Petitioner's *pro se* request for an extension of time to file a Petition for a Writ of Certiorari to and including December 28, 1992. Order (U.S. No. A-330). The jurisdiction of this Court is invoked under Rule 10.1 (c) of the Rules of the US Supreme Court of the United States (1990) and 28 U.S.C.A. Sec. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part:

"Congress shall make no law *** abridging the freedom of speech *** or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment provides:

"nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Michigan Constitution Article I, Sec 13:

"A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney."

Article III of the Michigan Tenure Law states in part:

"After the probationary period, a teacher shall be employed continuously by the controlling board under which the

probationary period has been completed, and shall not be dismissed or demoted except as specified in this act." (MCL 38.91)

Article IV of the Michigan Tenure Law reads in part:

"Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as hereinafter provided." (MCL 38. 101)

And: "Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified." (MCL 38.105)

Michigan State Tenure Commission Rules:

"Representation; Appearances. Rule 11. (1) Practice before the commission shall be limited to attorneys at law in good standing. However, any party may represent himself." (MCL R 38.141)

"Motion for Rehearing. Rule 28. A motion for rehearing may be filed within 60 days after the date of a decision. It shall state briefly and distinctly the grounds thereof." (MCL R 38.158)

STATEMENT OF THE CASE

Petitioner has been a tenured teacher under the laws of Michigan, since 1971. (App A, 1a, App C, 25a) Petitioner believes this case actually began in 1978 as a result of Petitioner's expression of First Amendment Rights in the form of free speech. At that time Petitioner wrote a letter to the editor of the local newspaper regarding the contract negotiations over the issue of agency shop provisions, proposed by the union, urging the Respondent Board to reject them. At the same time a new dictatorial principal is hired. (App A, p. 6a) Shortly afterward the union called a work action that Petitioner chose not to participate in. After some time and difficult bargaining, the

contract was adopted with agency shop provisions that excluded all current non-union teachers (less than 5%), including Petitioner, from having to pay fees. From this same time, Petitioner's problems with the school began. Petitioner was poorly evaluated and discriminated against in various ways. (App A, p. 5a-7a)

Petitioner had quit the union (NEA-MEA-ZEA) and his position as PAC representative in 1976 as a result of having been forced to contribute funds to promote political activities and ideological and religious points of view he opposed. This Court quoted "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." —Thomas Jefferson — in *Abood*. But at that time (1976), this Court had not ruled in *Abood v Detroit Board of Education*, 431 US 209, 97 S. Ct 1782, 52 L Ed 2d 261 (1977) that such use of union dues violated First Amendment rights. Bush felt as this Court did and had, as a result, avoided having to pay any dues. But Bush would pay a higher price later, as we shall see.

After two years of harassment, in the form of Plans of Assistance and poor evaluations, by Principal Jones, Bush was warned by the Principal that he better quit and find a new job or he would be fired at the end of the coming year (1980-81). (undisputed testimony) Bush refused to quit. During that year he was placed on another Plan of Assistance (App A, p. 6a) Bush also exercised another First Amendment Right, the right of petition, to oppose other school proposed actions. (unentered exhibit)

Petitioner, a tenured teacher under the laws of the State of Michigan, was laid off in 1981 allegedly for economic and decline in enrollment reasons. Shortly afterward, Bush was offered a part time position (3/5), which he refused. (App A, p. 1a-2a) The union's advice was that, if he accepted part-time, he would likely never get back to full-time. Two other union teachers, with much less seniority, were laid off, but offered one hour less, at the same time. Both accepted. One of these

teachers regained full time (Pease) through a joint grievance and the other worked part-time. (App A, p. 2a) Bush contends he could have had the hour (1/5) given to Pease, had it been offered him. The union refused to pursue the grievance and it was dropped by the union, after they told Bush he would have to pay for arbitration himself and it was unlikely to do any good. One union member had stated it would be different if Bush were a union member. Bush didn't know what that meant at the time, but he found out years later.

Before the layoff, in 1981, Bush was told by Jones that he was being laid off because he was lowest in seniority in the Industrial Arts (IA) department. (App A, p. 2a) What he did not tell Bush is most important. He did not tell Bush that senior teacher Lake has a minor in Social Studies (history) and could teach there (App A, p. 2a), that Lake, Drew, and Bush, could, anyone or all, have taught Alternative Ed. (App A, p. 3a, App C, 34a), that Drew could have taught other courses or classes in the Business department where he has a minor. (App A, p. 2a, 8a) In all these other areas Bush is senior to other teachers in those areas. (T) If any part of this information had been available to Bush at the time, Bush would not have been laid off. (App A, p. 3a-4a) When Jones took some of Bush's classes and courses and gave them to senior teachers, he was not honest. (App A, p. 2a, 6a, 14a–15a) Jones used fraud, deception and secrecy to get rid of and punish Bush.

A year later, 1982–83, Petitioner's incumbent position is increased from 3/5 to 4/5, but he is not recalled despite recall language in the contract and state law. (MCL 38.105, App C, p. 28a) A grievance (second) is filed after school started, because the union did not notify Bush of the schedule change until then, yet Robertson had known the fact since June. (App A, p. 2-3a, 9a, see Coe, Bush's replacement) At the arbitration Petitioner was barred from answering a question asked by the Arbitrator, if there was difficulties between Bush and Jones. Bush's union attorney, Lathers, said he did not want to get into that issue and dropped it, even though Bush had told the union attorney the day

before that he wanted to get into that issue very much. (T) The union wanted to establish a right to recall.

The arbitrator ruled at the end of July 1983, one year after the grievance was filed, Bush should have been recalled, but awarded no back pay because of Robertson's (Union Grievance Chairman) delay in notifying Bush of the change. (App A, p. 2-3a, footnote #8 p. 15a, 21) (The TC would later reverse the arbitrator's correct ruling, committing an error and conflict with rulings of this Court. App A, footnote #8 p. 15a, 17a)

By this time, Bush's incumbent position was again 5/5 with his replacement (Coach Coe) full time in his place. (App A, p. 3a, see Coe). Bush was not recalled to the 5/5 position in the months before the arbitration decision.

Two years after layoff and after the arbitration award, Bush was called to a conference with Superintendent Harper and union grievance chairman Robertson. Bush was threatened and told about how he would be treated if he came back. He was offered payment of one years salary and a percentage of salary for fringe benefits if he would resign. (App A, p. 9a, 13a-14a) Robertson made extensive notes of what was said and sent a copy to Bush. [Bush's attorney, Young, would refuse to enter the notes at the TC hearing, even when Bush insisted, claiming they were hearsay and could not be entered, despite the fact Robertson was a witness who claimed to have forgotten a lot. Bush could not challenge that legal claim then. Bush testified to what was said, but his claims were questioned by the dissent because Harper had claimed otherwise. (App A, p. 9a, 13a-14a, dissent p. 19a) Bush wanted to enter the notes at rehearing.(App B, p. 22a)]

Bush did not want and had no reason to abandon his career and profession, but he did not want to face the harassment that Harper said was coming, either. Bush accepted a Sabbatical Leave of Absence under this duress with the option of accepting the buyout in 1984 or returning to work, as written in a bilateral contract. (App A, p. 3a, 13a-14a)

In 1984, Bush was told there was no job for him, if he chose

to return. Bush chose to return anyway, but was laid off a second time. (However, his attorney [Young] again did not enter the letter, and other relative letters, to the TC record.) Bush was the only teacher laid off, again supposedly on the basis of a decline in enrollment, an allegation that Bush disputes and the TC found troublesome. (App A, p. 13a-14a) Evidence from the TC hearing reveals Pease, a union member with less seniority than Bush in Robertson's Business department, receives some courses that had been taught by Drew, a teacher senior to Bush in Industrial Arts (IA). Drew again receives some of Bush's incumbent IA courses. (App A, p. 2a, 13a) Lake does also.

Bush wanted to take the matter to court to decide the validity of the contract he held (Exhibit F). (App A, p. 13a) The union refused and would only submit it to binding arbitration. Bush did not like that, because he had lost a years salary at the last arbitration. Bush sought an attorney to represent him to no avail. As a result nothing was done.

Bush substituted for the local Skill Center through part of 1984-85. In February 1985, Bush was quickly dismissed without cause after a chance meeting with Zeeland Administer Klinge, where he had asked where Bush was working and Bush told him. No reasons were ever given, but Bush was told he would not be called again. Previously, Bush was used frequently and had been requested by the teachers and had a very good relationship there. Statements were made by the substitute secretary that someone had called her boss and after that she was told to call Bush to cancel prescheduled days and not to call him again. Afterward, Bush substituted at other local schools, but never again at the Skill Center. Bush testified concerning this denial of the "liberty" of "right to work" at the TC hearing. (t)

In the Spring of 1986, Drew, the most senior IA teacher retired. Bush was not recalled to the position. Coe instead received it. Another grievance was filed (third). (App A, p. 3a, 14a) In November 1986, Bush is recalled through the efforts of his private attorney to a position involving Alternative Ed. (App A, p. 3a, 15a) The union refused to take the grievance to

arbitration despite Bush's wish to do so and his offer to pay the cost.

The union did agree reluctantly and under pressure from Bush's private attorney to take his case to the TC. That began in 1987 and was heard in 1988. (App A, p. 3a-4a) Five months before the hearing, Respondent's attorney (Jon G. March) volunteered to write the Stipulation of Facts. He did nothing for 4 months, causing the Stipulation to be well past the due date and giving Petitioner only one look at it and no chance for final acceptance or rejection or to verify alterations had been made. The slanted Stipulation was finally filed the day before the hearing would begin. (TC Record #15 & #16) Petitioner's attorney made no objections.

Bush contended he was

> "...improperly laid off for the 1981-82 school year and that had he not been laid off he would have remained fully employed thereafter. He maintains that his 1981-82 layoff and his continuance on layoff status for subsequent years was the result of manipulation of course offerings, class schedules, and teacher assignments, and bad faith on the part of appellee board and/or its administrators. He contends that as a result, he was constructively demoted and discharged without reasonable and just cause under the guise of a necessary reduction in personnel." (App A, p. 3-4a)

Bush made at least two additional secondary claims regarding that year, although there were more he could have made had he known all the facts before hand.

> "Appellant further contends that, even assuming a reduction was necessary, the district was obligated to give him two alternative education classes to round out his schedule, or, under the terms of the collective

bargaining agreement, to place him in one of the seventh or eighth grade positions held by less senior teachers for which he held proper certification." (App A, p. 4a)

Bush had alternative theories, as well, that the TC did not act or rule upon. (App A, p. 4a)

The first decision of the Tenure Commission 4 to 1 in favor of Petitioner was entered on August 30, 1989. (App. A) In part:

> "We find that had Appellant been treated properly under the Act, he would not have been laid off for the 1981-82 school year but would have been fully employed as an industrial arts teacher or in a seventh or eighth grade position. Further, we find he would have remained fully employed thereafter." (App A, p. 18)

Thus, they granted two of the three positions Bush claimed. But a third where Bush could have had the Alternative Ed hours (2/5) of a new teacher, if there had been a real need to reduce personnel, they denied. (App A, p. 15a) Bush contends this error violates Tenure Law and federal rulings, because it would have him part-time and the new teacher (Fedewa) full-time. Bush could have had these hours by seniority before layoff if he had been informed by the administration that he was qualified for them.

Even the lone dissenting Commissioner found fault and stated:

> "While the Board's action in 1981-82 <u>is not beyond suspicion</u>, I am unable to conclude from this record that its laying off of Bush was improper and for that reason I would deny the petition." (App A, p. 20a) (Emphasis added)

The net effect is, all of the Commissioners had suspicions about the actions of the Board, however the majority correctly placed the burden of proof on the school not the teacher. (App A, p. 7a)

Petitioner requested his attorney file a Motion for Rehearing while the final briefs were being prepared, but he refused. After the TC decision, Petitioner again requested his attorney file a Motion for Rehearing, a right by Michigan Law (MCL R 38.158). (While most of the majority decision was correct, in two parts there are errors that conflict with the rulings of this Court.) He refused again, but only one day before the Motion was due. (Petitioner alleges the reason he would not file was because his attorney had a conflict of interest. Petitioner's attorney is contracted by the union to represent union teachers. The union knew the facts above at the times of the layoffs, but had given only token representation of Petitioner's interests before or at the time of the layoffs because of Petitioner's non-union status. Petitioner alleges his attorney refused to represent him fully, as duty would demand, preferring instead to protect union interests and, therefore, his own pay check. Some of the things the attorney did and didn't do before, at and after the hearing confirm that the attorney was only giving a small % of effort to the case.) Therefore, Petitioner had no choice but to file his idea of the Motion *pro se* with less than 24 hours to prepare and file it and only MCL R 38.158 as guidance, with copies to the OCCC.

Petitioner's reasons for the Rehearing were numerous. Some purposes were to enter documents and evidence omitted by his attorney and to pursue the unrevealed facts of secrecy, fraud and deception by the employer at the initial time of layoff, plus errors, inaccuracies, and due process violations in the Stipulation of Facts and to review free speech and other First Amendment activities, by the Petitioner, that are probable cause for the discrimination and deprivation he has suffered by the government employer in the two unjust layoffs, refusal to recall, violation of an individual contract and resultant loss of 5 years of property right employment Petitioner experienced.

Before the motion decision, Petitioner, by letter, notified the TC that his attorney threatened to withdraw in ten days, if he did not withdraw his Motion for Rehearing. Petitioner's

letter stated he would not succumb to the demand and at the same time requested TC cases to study. The letter was filed on the Dec. 11, 1989, according to TC record #26, with copies to the OCCC.

The TC made a Decision on the Motion on December 15, 1989 denying Petitioner's *pro se* Motion for Rehearing. They cited the fact that Petitioner had previously been represented by an attorney and stated "many" of the "21 Reasons for Rehearing" issues Petitioner had presented had already been decided. They concluded that Bush failed "to state grounds" and stated they use the "court rules" and cited some previous cases Bush had not heard of and were not available to him and none of this was referenced in Rule 28, (or anywhere else) the only directions Bush had. (App B, p. 21a)

Respondent School had, meanwhile, filed an Appeal of right of the initial TC decision to Ottawa County Circuit Court. (App C, p. 24a)

Petitioner filed a Cross Appeal *pro se* seeking review of the errors in part of the initial TC decision (Valesano p. 15 and Page p. 17a) and denial of rehearing again presenting the secrecy issue at layoff, errors of Stipulation and others regarding his Constitutional Rights to equal protection, due process, etc. (App C, 24a, 34-35a) His attorney did nothing.

Filing for Cross Appeal angered Petitioner's attorney more and he requested release, which Petitioner denied, even though he suspected by then his attorney had a conflict of interest. Petitioner had no other counsel familiar with the details of the lengthy case to depend on. OCCC granted Petitioner's attorney's request to abandon the case over Petitioner's objections in April, 1990, when briefs were due. That court then reversed Petitioner's favorable TC decision and denied Petitioner's *pro se* Cross Appeal on January 16, 1991. (App C, p. 35a)

Petitioner's new council sought Leave to Appeal to the Michigan Court of Appeals again raising the issue of secrecy of certification and qualification at layoff, the errors of the TC and

the refusal of the TC to grant Rehearing to that *pro se* request, but was denied 2 to 1 on July 19, 1991. (App D, p. 36a) A Motion for Reconsideration was denied 2 to 1 on September 30, 1991. (App E, 37a)

Petitioner *pro se* sought Leave to Appeal from the Michigan Supreme Court again raising the secrecy of facts at time of layoff, errors of the TC affecting Petitioner and errors of the OCCC and the "irrelevancy" issue of events after layoff as well as the issue of ignoring *pro se* litigant pleadings in the brief, but it was denied on April 24, 1992. (App F, p. 38a) Petitioner's *pro se* Motion for Reconsideration was denied on July 31, 1992. (App G, 39a) Petitioner *pro se* filed a timely Motion for Extension of Time for filing a Petition for Certiorari with the US Supreme Court. An extension of time was granted to and including December 28, 1992.

REASONS FOR GRANTING THE WRIT

I. THE U.S. SUPREME COURT SHOULD REVIEW THIS CASE BECAUSE THERE ARE SEVERAL RARE OPPORTUNITIES PRESENTED WITHIN THIS CASE WHERE CONSTITUTIONAL LAW QUESTIONS NEED TO BE ANSWERED.

In *Haines v Kerner*, 404 US 519, 30 L Ed 2d 652, 92 S Ct 594 (1972), a *pro se* rights and petitioned case, this Court stated they are more lenient with *pro se* petitioners pleadings and rightfully so. The Court stated: "The United States Supreme Court holds allegations of a *pro se* complaint to less stringent standards than formal pleadings drafted by lawyers." (p. 653-654) Petitioner would request this Court grant the "less stringent standards" plus grant this Petition.

This case covers numerous violations of rights that are not typically presented to the Court in one case, free speech and petition, liberty of the right to work, equal protection of the law, property right employment denied by layoff, *pro se* rights, etc.

In Justice Marshall's dissent in *Board of Regents v Roth*, 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701 (1972), he cited the following pertinent quotes: quoting US Supreme Court Justice Douglas

> " `It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.' *Joint Anti-Fascist Refugee Committee v McGrath*, supra, at 179, 95 L Ed at 858 (concurring opinion)." (p 568)

Then quoting lower federal court.

> " ` [t]he public has the right to expect its officers . . . to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse.' (cite omitted) (p 568)

This is a case where a public school administrators have been given "absolute and uncontrolled discretion" in the school affairs and it has resulted in the "abuse" of Petitioner Bush for 15 years. The school lacks any due process rights. One is charged, tried and found guilty by the same administrator regardless of facts

A. THIS COURT SHOULD HEAR THIS CASE BECAUSE THERE IS NO SIMILAR CASE OF EMPLOYMENT FRAUD, DECEPTION, AND SECRECY ON THE RECORD RESULTING IN GREAT DEPRIVATION IN REGARD TO PROPERTY RIGHT EMPLOYMENT AS A RESULT OF FALSE ALLEGATIONS OF NEED TO REDUCE PERSONNEL.

When Petitioner was laid off in 1981, he was unaware that he should not have been laid off, but his Principal, Mr. Jones, knew full well, under the true facts, Bush should not have been laid off. To high school teachers, "certification and qualifications" are essential. (App A, p. 2a, 3a) They determine where and what subjects you can teach. College students are "certified" by the state at the time they graduate to teach certain subjects according to the new teachers major and minor in college. Michigan State Tenure Case Law allows schools to unilaterally determine who is "qualified" to teach the various subjects. (App A, p. 14a) Which one of the two has greater import and preference has not been decided. "Certification" is the least arbitrary. "Qualification" determination can depend upon the "whims" of a given administrator, as in this case. (App A, p. 14a) Testimony established that there is no written record for reference of who is certified or qualified to teach the various subjects or courses at Zeeland High School. Without a written and published record, these facts could only be obtained from the Principal and usually he made the determination without any consultation with the teacher. (App A, p. 14a) It was also established that Principal Jones was solely responsible for the scheduling of teachers, subjects, hours, etc. and had exclusive access to the pre-enrollment numbers of students interested in the various courses. (App A, p. 14a-15a, 7a-8a)

The TC determined that Principal Jones was in a position to and had unjustly terminated Petitioner's employment by a false need to reduce personnel. (See below) But the TC ruling, while entirely correct as cited here, is incomplete and incorrect in other parts. Bush attempted to complete the record in his *pro se* motion for rehearing where he could have established the charges of fraud, deception and secrecy in certification and qualification as the means of this unreasonable and unjust reduction in personnel at the time.

B. THE COURT SHOULD HEAR THIS CASE BECAUSE THE FACT FINDING MICHIGAN TEACHER TENURE COMMISSION MAJORITY CORRECTLY FOUND THAT PETITIONER BUSH SHOULD NOT HAVE BEEN LAID OFF, BUT MADE TWO ERRORS, IN ADDITION, THAT CONFLICT WITH THIS COURTS PREVIOUS "PROPERTY" RIGHT DECISIONS, MICHIGAN TENURE LAW, AND PREVIOUS MICHIGAN COURT DECISIONS, AND PETITIONERS CONTRACTUAL RIGHTS.

The Tenure Commission noted that the school had the burden of proof of need for reduction in personnel and failed to carry that burden and that the administrator was in a position to deprive Petitioner of his employment and, in fact, had done so. (App A, p.) In Justice Marshall's dissent in *Board of Regents v Roth*, 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701 (1972), he cited the following pertinent quote:

> " `...absolute and uncontrolled discretion invites abuse.' (cite omitted) p 568

The TC correctly found that Mr. Jones was in a position of "absolute and uncontrolled discretion" when they stated:

> "Mr. Jones had considerable control over the scheduling and was responsible for teacher assignments. Thus, the means to effectuate a reduction or elimination of an individual teacher's assignment was available." (App A, p. 14a-15a)

Since Petitioner had no mechanism for discovery or review at the time of layoff, Petitioner experienced the resulting "abuse", as predicted, the TC found. The TC found that Bush could have been employed in 2 of 3 separate places he had claimed. One was Bush's incumbent IA position and the other a middle school position allowed by the contract. (App A, p. 15a, & B p. 22a)

While this decision favored Petitioner for the most part, the Commission erred in part in granting a new teacher, with no

tenure rights or seniority rights, preference for "Alternative Ed." hours over Petitioner, in total disregard of his possession of both tenure "property" rights and seniority rights. (App A, p. 15a, 4a) Both the majority and dissent cite the contract language, but fail to understand it. The first six words of the first line are not understood. (App A, p. 11a, 18a) Bush's claim rests here.

This ruling is in contradiction to *Board of Regents v Roth*, 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701 (1972) and subsequent cases where this Court found that tenure is a "property" right protected by the Constitution, if it is established by State law, which in this case it is, and nontenured teachers do not have the right. (App A, dissent p. 19a) Even the OCCC provided a Michigan Supreme Court cite and quote that proves probationary (or new) teachers have no preference over tenure teachers. (in a different context) (App C, p. 32a) Therefore, it makes no sense for a teacher without rights to be given preference over a teacher with rights and is a clear error of law and contract.

The second glaring error is the TC reversal of the arbitration ruling that had been found in Bush's favor. (App A, p. 2a-3a, 17a footnote #8) They awarded Petitioner's incumbent position to his replacement simply because the replacement (Coe) was "on staff" and Bush was laid off, with no rights given to Bush, who had the greatest measure of tenure length, (App A, p. 1a, App C, p. 25a) was the incumbent, and had contractual (App A, p. 11a-12a) and state law "recall" rights. (MCL 38.105 see App A, p. 16a footnote #3) This finding negates all of Petitioner's recall rights.

This Court should note that neither of these TC errors, or the cases cited by the TC in support (*Valesano* and *Page*), have had any court review. (App A, p. 15a, 17a footnote #8) (Note also that Valesano was unjustly denied her "property" right employment way back in 1978.)

C. THIS COURT HAS A RARE OPPORTUNITY TO REVIEW A CASE WHERE BOTH THE UNION AND THE GOVERNMENT EMPLOYER DISCRIMINATED AGAINST AND UNJUSTLY DENIED A GOVERNMENT EMPLOYEE, WHO IS A MINORITY NON-UNION TEACHER, HIS RIGHTFUL PROPERTY RIGHT EMPLOYMENT.

Petitioner believes there is probable cause to believe there was collusion with the union in both layoffs. All union members, but one (a low seniority teacher who lost 1/5), were kept fully employed, while Bush was off more than 5 years. Bush, in his second layoff, was the only teacher laid off. A similar case where the union and school employer joined together to eliminate a government employee with tenure property right employment in Michigan case law is *Hunter v Wayne Westland Schools*, 174 Mich App 330 (1989) The case is different in that the action was not a tenure action, but under Section 10 of the *Employment Relations Act*, MCL 423.210. The MCA found in favor of the teacher. But in *Hunter*, in contrast to the present case, the actions of the union and school were open and clearly visible to Hunter at the time. In *Bush*, the acts were hidden and secret, and resulted in the theft of Bush's employment and benefits for over 5 years and continued lower pay scale.

The Union had cause to want Bush out. Petitioner had exercised his Free Speech rights to openly and publicly oppose union goals and activity, did not participate in union work actions and did not pay dues.

Bush, as a non-union teacher, was made to do various things no union member had to do. He was and is harassed yet, by the same administrators. Both insist he must do the various things the administrator requires or be subject to firing for insubordination, whether or not the reasons are just or fair. Even now they have reduced his time available to work on this case. They have literally robbed him of thousands of hours of time this way.

D. THIS COURT HAS AN OBLIGATION TO DECLARE THAT NON-UNION TEACHERS ARE DUE THE EQUAL PROTECTION OF THE LAWS, THE SAME RIGHTS, BENEFITS, SALARY, ETC. AS ANY AND ALL UNION MEMBERS HAVE RECEIVED AND HE HAS BEEN UNJUSTLY DENIED.

Union members were kept on the payroll instead of Bush, when under fair and just conditions at the two times of layoff, they would not have been. All other teachers that would have been laid off or reduced, had the true facts been known at the time of lay off, were union members or would have had to pay agency shop fees.

"Equal protection of the law" should apply to union and nonunion teachers equally. Yet here we have an instance where lack of union membership caused "equal protection" of the Michigan Tenure Law and Constitutional Rights to be disregarded unjustly and unfairly.

Union teachers, unjustly retained, received full salary and all benefits normally given for their services. Bush lost all that. Even if he had won, under the TC cited *Shiffer* ruling, he would not be compensated for lost benefits or just interest, etc. and would still have the deductions of mitigation and receive no attorney fees or punitive damages or compensation for the huge amount of time and effort to carry this case *pro se*. (App A, p. 16a) Bush argued at OCCC the school would still profit by it's unjust actions and the union certainly had.

E. THIS COURT HAS ANOTHER RARE OPPORTUNITY, TO REVIEW A CASE WHERE FREE SPEECH AND OTHER FIRST AMENDMENT RIGHTS ARE THE APPARENT CAUSE OF THE EMPLOYER AND UNION'S DEPRIVATION OF EMPLOYMENT RIGHTS OF A GOVERNMENT EMPLOYEE.

Years after the initial layoff, Bush began to discover that

the layoffs were fraudulent, deceptive and accomplished by secrecy of vital facts essential to Petitioner's right to continued employment. Petitioner's immediate supervisor had deliberately contrived circumstances and the schedule of teachers in an unjust way as to deprive Petitioner of his right to continued government employment. Bush had exercised his First Amendment rights several times before he was first laid off (p. 3–4)..

In *Perry v Sindermann*, 408 US 593, 597, 598, 33 L Ed 570, 92 S Ct 2694 (1972) this Court ruled a teacher should not have to pay the price of loss of his employment for exercising his free speech rights. A right or freedom is not a true right or freedom when it has this price tag attached. People will not exercise their rights out of fear of retaliation by their employer. Bush never anticipated the consequences and considerable deprivation and discrimination he would face and suffer as a result of his First Amendment Right activities. Since that time, he has not been at "liberty" to express his First Amendment rights because of fear of additional retaliation.

F. THIS COURT HAS NOT HEARD A CASE WHERE THE GOVERNMENT EMPLOYER AND OR IT'S AGENTS HAVE DENIED A FORMER EMPLOYEE THE LIBERTY OF THE RIGHT TO WORK AT NEW EMPLOYMENT. THE EMPLOYEES RIGHTS ARE UNDEFINED.

During the second layoff period (after 1984) Petitioner found part-time substitute teaching employment with a new employer. Subsequently he was dismissed without cause, within days after answering a Zeeland Administrators question of where he was working. (see p. 7 above) Petitioner has alleged that administrators at Zeeland Public Schools caused his dismissal and denied him the "liberty" of the "right to work", which this Court found offensive in *Board of Regents v Roth*, 408 US 564, 572-3, 581, 584 & dissent by Marshall 588-589, 33 L Ed 2d 548, 92 S Ct 2701 (1972).

II. THE COURT SHOULD HEAR THIS CASE BECAUSE *PRO SE* LITIGANTS ARE A RARE MINORITY, ARE RARELY GRANTED REVIEW AND ARE TREATED UNJUSTLY IN COURTS OF LAW WHERE THEY ARE DENIED THE EQUAL PROTECTION OF THE LAW AND DUE PROCESS RIGHTS AND CONSIDERED A VIRUS BY ATTORNEYS AND JUDGES.

Petitioner had tried to get numerous attorneys in the past, but none would accept the case until one in about 1985. He moved in about 1988, after helping Bush get back to work. Petitioner had never represented himself before, but he was forced to by circumstances. Petitioner first appealed *pro se* to the TC in a Motion for Rehearing, when his attorney would not file even though he admitted he had little faith in the TC decision. Petitioner's "due process" rights were denied, when the Motion was denied unjustly. (App B, 21a)

Petitioner next filed a *pro se* Cross Appeal with the OCCC, when his attorney would not do that either. Then his attorney was granted withdrawal by the court. Therefore, Bush had to present three briefs to the court *pro se*, while still teaching school full-time and at the same time studying the law, typing, printing, copying, etc. For oral arguments, a new attorney was hired who had no familiarity with the case. But the TC and the OCCC and the MSC rejected these *pro se* appeals without a speck of consideration.

A. *PRO SE* MOTION REJECTED BY THE TC

The TC expected Petitioner to know intuitively that they used the "court rules" and that the requirements were in some case they had decided that was not even listed in any index. (App B, p. 21a-23a) (No one but someone reading the cite in some other case would have ever known there was such a case). Because there was no index, the only way Bush could find out what cases there were was if they were cited in an opposing brief or another case he had secured as a result of a cite in a previous

brief. The TC rules do not state they use the "court rules" nor do they state how to get any supporting case law. (MCL R 38.158)

When the TC rejected the *pro se* Motion because it didn't state any grounds, how could they expect any different? They didn't give any directions on what they expected. (MCL R 38.158) Bush contends there were several valid grounds that he presented as reasons for review. Petitioner alleges this denial denied him "due process". See *pro se* ruling in *Haines v Kerner*, 404 US 519, 30 L Ed 2d 652, 92 S Ct 594 (1972) (headnote #1, #2).

B. PRO SE CROSS APPEAL REJECTED BY THE OTTAWA COUNTY CIRCUIT COURT

Then the OCCC rejected the *pro se* arguments without paying an iota of attention to them. The court wrote a 12 page opinion that had only one small paragraph on the last page that mentioned only two items of Petitioner's Cross Appeal in rejecting it. (App C, p. 34a-35a) Not one opposing argument offered by Petitioner to the arguments of the school was mentioned. It is probable none were read or considered. Yet the court quoted extensively from the schools petition. (App C, p. 24a-25a) Petitioner maintains that any high school student could have followed his logic and found opposite that of the court.

The First Amendment states in part "...make no law...abridging the freedom ... to petition the government for a redress of grievances." Petitioning the government includes the courts. For the court to ignore the petition of *pro se* litigant's violates his Constitutional right. Further, to find opposite a just court (TC) by ignoring *pro se* petitions, doubles the violation of his rights.

In *Goldberg v Kelly*, 397 US 254, 25 L Ed 2d 287, 90 S Ct 1011, (1970) this Court stated: "The fundamental requisite of due process of law is the opportunity to be heard; the hearing must be...in a meaningful manner." The OCCC did not have a

"meaningful" hearing of the matters in any respect.

C. *PRO SE* REQUEST FOR LEAVE TO APPEAL REJECTED BY MICHIGAN SUPREME COURT.

Despite making the same arguments here, that the *pro se* litigants are ignored, the Michigan Supreme Court would not give any chance to appeal the previous rulings. (App F, 38a, App G, p. 39a)

D. *PRO SE* CASES RARE AT U.S. SUPREME COURT

According to USSC Lawyers Edition (L Ed 2d) index only about 1/2 of one column on one page of the 6 volume index set, each having about 1000 pages, are cases heard regarding *pro se* representation by the US Supreme Court. The most recent was in volume 100, but the page number of 126 was wrong, so the case was not found. The previous most recent of general application was *Faretta v California*, 422 US 806, 45 L Ed 2d 562, 95 S Ct 2525 (74-75) in 1975. Apparently, only about 10 *pro se* rights cases have ever been heard, a mere scintilla of the literally thousands of cases decided by this Court. Almost all were criminal rights. The 83 volume American Jurisprudence set has no listing for *pro se* or self representation. This Court found that *pro se* representation is a great part of the history of this country and it's legal system in *Faretta, supra*, but today it is a sure way to have the "scales of justice" fall on your head. Schools have big money and can waste some on slick attorneys to cover the tracks of slippery administrators. *Pro se* litigants are not so fortunate.

Giving no heed to *pro se* litigants arguments is unjust. It violates Petitioner's rights under the Constitution and Bill of Rights. This Court provided rock hard evidence of the individual citizens right to self representation in *Faretta, supra* In addition, both the Michigan Tenure Law (MCL R 38.141) and the Michigan Constitution (Article I, Sec. 13) provide the right to self representation. It is untenable that the *pro se* litigant has the right to represent himself, but that the "Scales of Justice" have no obligation to weigh or even to read or consider the *pro*

se arguments. Petitioner maintains this practice is routine. (see App. H, p. 40a, obvious violation of *Texas v Johnson*, 491 US 397, 105 L Ed 2d 342, 109 S Ct 2533 (1989)) The *pro se* litigant minority, must be accorded the "equal protection" of the law and "due process" rights of the Constitution.

Petitioner alleges that the reviewing courts are biased against *pro se* petitioners and ignore valid arguments based on the fact of the minority filing, according them no rights, preferring instead to protect their own profession. Petitioner urges this Court to find that ignoring *pro se* briefs, arguments, and testimony violates the Constitutional Rights of Petitioner and other *pro se* litigants.

As a direct result of ignoring the *pro se* briefs, the OCCC arrived at erroneous, unreasonable and unjust conclusions.

III. THE COURT SHOULD HEAR THIS CASE BECAUSE THE ONLY REVIEWING MICHIGAN COURT MADE NUMEROUS ERRORS IN ADDITION TO IGNORING THE PETITIONER'S *PRO SE* ARGUMENTS.

A. THE COURT ERRED IN DECLARING THE EVENTS AFTER THE INITIAL LAYOFF IN REDUCTION IN PERSONNEL CASES ARE "IRRELEVANT" TO THE DETERMINATION OF BAD FAITH (OR GOOD FAITH) IN THE LAYOFF.

The court ruled that the numerous events in this case of bad faith after layoff are "irrelevant" or "inappropriate" to the determination of "bad faith" in the layoff. (App C, p. 33a-34a) This ignores Petitioner's "property" recall rights mandated by Michigan Law for tenure teachers (MCL 38.105) and ignores the fact that Petitioner was laid off more than once. The second layoff time was 1984 and each time unjustly. (MCL 38.101) (App A, 13a-14a) (However, Petitioners second layoff never became an obvious part of the initial record due to the errors and

omissions of Petitioner's attorney and fraudulent practices by opposing counsel in the Stipulation of Facts. The second layoff had virtually no decline in enrollment and, therefore, provided a stark enrollment contrast to the first layoff where an alleged 25% enrollment decline supposedly occurred. It also was accomplished with fraud, deception and secrets that still had not been revealed yet three years after the first layoff.)

The OCCC ignores the fact that Petitioner was forced by undue pressure to accept a sabbatical after two years of layoff. (App A, p. 3a, 9a-10a, 13a) It ignores the fact Petitioner fulfilled his part of the bilateral contract (for the sabbatical-buyout or return to teaching), but was unilaterally denied the benefit of reemployment he was to derive from the contract by the fraud, deception and secrecy of the Respondent. (App A, p. 13a-14a) It ignores the failure to recall when Drew, a senior teacher, retires. (App A, p. 14a) There is also the denial of the "liberty" of the right to work at other employment. (Transcript testimony) The court hearing the facts and testing the creditability of witnesses should decide what is "relevant" evidence, not the court reviewing the case.

The Tenure Commission had found the events after layoff were very "relevant". "Our finding of bad faith is further supported by the timing of appellant's layoff — on the heels of the 1981 final evaluation for the plan of assistance — as well as evidence of events occurring after 1981-82." Not just one event, but numerous "events" were "relevant". (App A, p. 13a-15a)

It is completely unreasonable for the court to conclude the events after layoff are "irrelevant". Even in criminal law the events after a crime are important to the total evidence of the case. Bush certainly did not consider the events after layoff "irrelevant". He detailed a lot of the factual events after layoff in testimony that presented the bad faith intent of Principal Jones and Superintendent Harper.

B. THE COURT FAILED TO DISPROVE THE TENURE COMMISSION'S PRIMARY FINDING THAT THE RESPONDENT SCHOOL DID NOT CARRY THE BURDEN OF PROOF IN PROVING A NEED TO REDUCE PERSONNEL.

The TC determined that "The controlling board has the burden of establishing the need to reduce personnel." (cite omitted) (App A, p. 7a) Respondent School entered only one piece of documentary evidence of an alleged decline in enrollment, limited to IA enrollment. (Exh KK) (App A, p. 5a) Most of the evidence they had provided to the TC of a decline in enrollment was verbal, including testimony of an alleged decline caused by Petitioner Bush. (App A, p. 8a) The TC, fact finder in this case, found oppositely. (App A, p. 10a) They found Bush had an excess of one class in his areas of teaching, Auto Mechanics and Metals, for the current year (1980-81) and the coming (1981-82) year verified by Exh KK. (App A, p. 10a) The Transcript reveals that at the end of the hearing Jones admits he doesn't know if there was any decline in Bush's enrollment. (T. 498) Of course this is after Bush has testified he has an excess of one class in his exclusive areas.

Exhibit KK, alleged to show a decline in enrollment, shows a fact unrecognized by the OCCC. There was a drop of total courses offered in the IA department at two different times. (App A, p. 10a, 13a-14a) This is significant, since Mr. Jones controls the schedule of teachers, courses, classes, etc. (App A, p. 14a-15a, 7a-8a) Another fact the TC considered is that the enrollment for 1981-82 was 237 when Bush is cut by 2/5. But in future years, without Bush, the enrollment would be lower yet, to 216 (9% less) and yet all three IA teachers would be full time. (App A, p. 8a) The TC noted that in two different years less IA courses were offered, only when it could affect Bush. (App A, p. 10a, 13a-14a)

C. THE COURT INVADED THE FACT FINDERS AREA OF EXPERTISE AND JUDGEMENT ON THE FACTS OF THE CASE AS PRESENTED.

The court did not disprove the TC conclusion that Principal Jones had exclusive control over the scheduling of teachers and scheduled them in such a way as to cause the layoff of Bush. (App A, p. 14a-15a) The TC cited enrollment numbers which Jones had supplied as an exhibit (KK). Those numbers, taken according to the other facts of the case, do not reveal a 25% decline in enrollment. The TC seen these facts and ruled accordingly. If you ignore the other facts and the expertise of the TC in these school matters, as the OCCC did, then the OCCC conclusion is an anticipated normal result. The result of ignoring *pro se* petitions.

The truth is that Jones in the same exhibit is caught dropping 25% of the IA department courses before enrollment. These courses were advanced courses (dropped). That is in and of itself evidence there was no decline. A decline in enrollment would first impact introductory or beginning classes in the earlier grades (9th, 10th).

D. THE COURT RULED IN ERROR THAT THE KEYSTONE OF THE CASE WAS THE TC ERROR IN CONTRACT INTERPRETATION.

Assume the TC did error in the contract interpretation (they did not). (App C, p. 27a) So what? If there was no need to reduce personnel, as the TC ruled, (see above) the contract interpretation is irrelevant. The 7th or 8th grade claim was a secondary or alternative claim, not the primary claim. (App A, p. 3a-4a, 5a, 10a, 15a) The other facts of the case, recited above, where the court did not disprove the findings of the TC leave the courts ruling riddled with errors, just what would be expected when *pro se* rulings are ignored.

E. THE COURT FAILED TO CONSIDER SERIOUSLY THE CROSS PETITION FOR REVIEW AND THE CLAIMS MADE THEREIN.

The Cross Petition alleged various errors and established those errors through reference to the court rules as required and the evidence of record. The TC errors may not have been well presented *pro se*, but they had enough volume and total weight of evidence to deserve full consideration and, in an unbiased forum, would have resulted in an order of rehearing, at least.

F. THE COURT GRANTED PETITIONER'S ATTORNEY THE RIGHT TO ABANDON THE CASE AT AN INOPPORTUNE TIME AND CIRCUMSTANCE AND COMMITTED ANOTHER ERROR.

Petitioner's attorney failed to represent Petitioner in good faith in the legal matters in and before the hearing and then refused to represent his best interests after the decision almost causing the loss of the right to file any Motion for Rehearing by his unwarranted delay in notifying Petitioner he would not do it. Then he threatens Petitioner with abandonment, (see TC entry #) if Petitioner does not withdraw his motion, and ultimately does abandon the case because Petitioner filed a Cross Appeal to protect his rights. The OCCC failed to mention the withdrawal proceeding and erred in granting the withdrawal. Petitioner began to tell the judge of the attorney's conflict of interest, but the judge wouldn't listen.

The court erred in granting withdrawal at this time and for the reasons that Petitioner was pursuing his due process rights, but should have instructed the attorney to do his job and do it with diligence and professionalism to the best of his ability or be held in contempt of court. Petitioner alleges this granting of abandonment deprived him of "due process" based on *Evitts v Lucey*, 469 US 387, 83 L Ed 2d 821, 105 S Ct 830 (1984-85) where this Court ruled a there is a right to competent counsel in the first appeal of right and cited: "*Anders v California*, 386 US, at 744, 18 L Ed 2d 493, 87 S Ct 1396 (`constitutional require-

ment of substantial equality and *fair process* can only be attained where counsel acts in the role of an active advocate) (emphasis added)" *Evitts*, 404. Petitioner would emphasize the "active advocate" portion, since his attorney was inactive. (see p. 10–11 above) Petitioner's first appeal of right was to OCCC.

CONCLUSION

In conclusion Petitioner would like to reference opinions of this Court which summarize the deprivations Petitioner and his family have experienced as a direct result of the government employer's actions against him under the disguise of a reduction in personnel. *Board of Regents v Roth*, 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701 (1972) All emphasis is that of the Petitioner. Dissenting opinion by Justice Douglas:

> "When a violation of First Amendment rights is alleged, the reasons for dismissal or for nonrenewal of an employment contract must be examined to see if the reasons given are only a cloak for activity protected by the Constitution." p. 582
>
> "In (cite omitted) we held that an applicant could not be denied the opportunity for public employment because he had exercised his First Amendment rights." p. 583-4
>
> " '[T]he 'protection of the individual against arbitrary action' . . .[is] the very essence of due process," (cite omitted), but where the State is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of such 'arbitrary action.'" p. 584

"Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State." p. 585

And dissenting opinion by Justice Marshall:

"This Court has long maintained that `the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.'" (cite omitted) p. 588

"...liberty—liberty to work—which is the `very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment." p 588-589

" `...absolute and uncontrolled discretion invites abuse.' (cite omitted) p 590

And in *Cleveland Board of Education v Loudermill, Parma Board of Education v Donnelly*, 470 US 532, 84 L Ed 2d 494 105 S Ct 1487 (1985)

"We have frequently recognized the severity of depriving a person of the means of livelihood." (cite omitted) p. 543

Justice Marshall, concurring in part and concurring in the judgement.

"To my mind, the disruption caused by a loss of wages may be so devastating to an employee that.....additional predeprivation procedures are necessary to minimize the

risk of an erroneous termination."

"After wage termination, the employee often must wait months before his case is finally resolved, during which time he is without wages from his public employment." p. 549

"Even if reinstatement is forthcoming, the same might not be true of back-pay . . . and the delay in receipt of wages would be thereby be transformed into a permanent deprivation. Of perhaps equal concern, the personal trauma experienced during the long months in which the employee awaits decision, during which he suffers doubt, humiliation, and the loss of an opportunity to perform work, will never be recompensed, and indeed probably could not be with dollars alone.

That these disruptions might fall upon a justifiably discharged employee is unfortunate; that they might fall upon a wrongfully discharged employee is simply unacceptable." p. 550

Justice Marshall found that a "wrongfully discharged" public employee situation to be "simply unacceptable". It is Petitioner's prayer, after waiting this many years, that this Court find likewise in this case and grant this Petition.

Respectfully submitted,

December 24, 1992

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APPENDIX A

OPINION OF THE
MICHIGAN TEACHER TENURE COMMISSION

August 30, 1989

(Filed August 30, 1989)
STATE OF MICHIGAN
STATE TENURE COMMISSION

GERALD BUSH,
Appellant

v Docket No. 87-30

BOARD OF EDUCATION OF THE
ZEELAND PUBLIC SCHOOLS,
Appellee

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DECISION AND ORDER

BACKGROUND FACTS[1]

Appellant, a tenured teacher, began his employment with appellee school district in September, 1969, teaching industrial arts classes at the high school until he was laid off for the 1981-

82 school year. Appellant is certificated to teach industrial arts in grades 9-12. He has a major in auto mechanics and a minor in metals. He is also certificated to teach all subjects in grades seven and eight.

Appellee also employed two other industrial arts teachers, Robert Drew, whose major is industrial arts and minor is business, and Donald Lake, whose major is also industrial arts and minor is history. Both teachers had greater seniority than appellant, and the district used seniority as a qualification standard in layoff and recall situations. (Exhibits Q, R, S, T).

In the spring of 1981, the high school principal, Michael Jones, verbally informed appellant that his teaching position would be reduced from full-time to a 3/5 position for the 1981-82 school year due to reduced student interest and enrollment in the industrial arts classes and because appellant had less seniority than Drew and Lake.[2] Appellant was officially notified that he would be laid off for the 1981-82 school year in a letter dated June 10, 1981. (Exhibit A). Subsequently, appellant was offered the 3/5 position but declined it. Appellee hired Doug Coe for the position. Coe was on continuing tenure from another district. Upon completion of the 1981-82 school year, appellee granted Coe tenure.

Two other high school teachers, Richard Pease and Nancy Wheeler, were laid off at the same time as appellant's layoff. The union filed a grievance on behalf of all three teachers, but it was later withdrawn. Pease's layoff involved the reduction of one class from his assignment. However, before the school year began, another class was added to his schedule and he remained employed as a full-time teacher. Wheeler's position was reduced to part-time. She was returned to full-time work for the 1984-85 school year.

For the 1982-83 school year, one more class was added to the part-time industrial arts position, making it a 4/5 position. This 4/5 position was awarded to Doug Coe. Appellant filed a grievance contending that he should have been recalled to the 4/5 position. The matter proceeded to arbitration, and on July 29,

1983, the arbitrator issued an opinion finding that, under the collective bargaining agreement, appellant should have been awarded the position based on certification, qualification and seniority. The arbitrator awarded reinstatement. Appellant, however, did not return to teaching for the 1983-84 school year. Instead, he entered into a sabbatical agreement with appellee. During that school year, Coe taught as a full-time industrial arts teacher, as did Drew and Lake.

For the 1984-85 school year, appellant informed the district of his intentions to return from sabbatical to teaching. Appellant was informed that only 10 industrial arts courses were scheduled for the year and because Drew and Lake had more seniority than he, they would be teaching those courses. Thus, appellant remained on layoff status for the year. Coe, who had earned his certification in elementary education, was moved to the elementary school. The situation remained the same for the 1985-86 school year.

In the spring of 1986, Mr. Drew gave notice of his retirement effective at the end of the 1985-86 school year. Appellee did not recall appellant to the position. Drew had taught woodworking courses and appellee determined that appellant was not qualified to teach those courses pursuant to North Central Accreditation Association requirements. (STC Tr, pp 367, 371, 372; Exhibit G). The position was posted. Mr. Coe applied for and was awarded the position.

Appellant filed a grievance concerning the board's failure to recall him to the Drew position. The grievance was dismissed pursuant to an agreement entered into by the district and appellant. Appellant was returned to a full-time assignment in an alternative education position and was paid a sum of money as if he had been employed at the outset of the 1986-87 school year. (Exhibit 0). The settlement does not constitute an admission of wrongdoing. (Stipulation P #27).

On October 29, 1987, appellant filed his petition with this Commission. He contends that he was improperly laid off for the 1981-82 school year and that had he not been laid off he

would have remained fully employed thereafter. He maintains that his 1981-82 layoff and his continuance on layoff status for subsequent years was the result of manipulation of course offerings, class schedules, and teacher assignments, and bad faith on the part of appellee board and/or its administrators. He contends that as a result, he was constructively demoted and discharged without reasonable and just cause under the guise of a necessary reduction in personnel.[3]

Appellant further contends that, even assuming a reduction was necessary, the district was obligated to give him two alternative education classes to round out his schedule, or, under the terms of the collective bargaining agreement, to place him in one of the seventh or eighth grade positions held by less senior teachers for which he held proper certification.

As alternative theories, appellant contends that, assuming appellee's actions toward him were proper prior to 1983-84, he should have been returned to a full-time position following his sabbatical. He says the board's failure to place him upon his return, and its failure to recall him to the vacancy created when Mr. Drew retired for the 1986-87 school year are more examples of bad faith.

Appellee denies all wrongdoing and contends there existed legitimate educational purposes for all its actions regarding appellant. Moreover, appellee contends appellant's petition was untimely filed and should, therefore, be dismissed.

A hearing was held before the designated administrative law judge. Subsequently, the parties filed briefs, the last of which was filed on August 8, 1988.

ISSUES

1. Is appellant's petition barred for untimeliness?
2. Did appellee wrongfully discharge or demote appellant under the guise of a necessary reduction in personnel, and/or fail to recall him to the first vacancy for which he was certified and qualified pursuant to the Teachers' Tenure Act?

DISCUSSION

Issue 1 — Is appellant's petition barred for untimeliness?

It is undisputed that appellee did not provide appellant with notice of his right to appeal any of the board actions affecting his employment. This failure tolled the 30 day appeal period provided for in the Act. Biberstine v Port Austin School District No 9, 51 Mich 274; 214 NW2d 766 (1974); Goodwin v Board of Education of the School District of the City of Kalamazoo, 82 Mich App 559; 267 NW2d 142 (1978). Accordingly, we conclude that appellant's petition was timely filed.

Issue 2 — Did appellee wrongfully discharge or demote appellant under the guise of a necessary reduction in personnel, and/or fail to recall him to the first vacancy for which he was certified and qualified pursuant to the Teachers' Tenure Act?

Appellee says the reduction in industrial arts courses for the 1981-82 school year was the result of decreased interest and enrollment on the part of students. It attributes the decreased interest to a number of factors, including the parents' reaction to the "Nation at Risk" report which indicated a greater emphasis on academic courses, the opening of the Ottawa Skills Center where a number of its students were able to take advanced courses in the industrial arts area, and the fact that one of the high school classes had an unusually high number of female students. (STC Tr, pp 35, 422).[4] Counselor Martha McMillan testified that, ordinarily, female students tend not to sign up for the industrial arts courses. (STC Tr, p 44).

Appellee says that industrial arts enrollment figures dropped from 318 students in 1980-81 to 237 for 1981-82, and it was forced to reduce the number of courses offered for the year. This resulted in a decreased assignment for one industrial arts teacher. Appellee states that because appellant had the least seniority of the three industrial arts teachers, his assignment was reduced.

Appellant contends he was wrongfully laid off for the 1981-82 school year. He says his industrial arts position should not have been reduced from full-time to 3/5. He says his layoff

was done in bad faith and constitutes a subterfuge.

Appellant was first employed by appellee in 1969. His layoff occurred some 12 years later. He traces his difficulty to the time Michael Jones became the high school principal in 1978 and began recording deficiencies in appellant's performance as a teacher, and cites actions occurring from 1978 to 1986 to support his claim of bad faith.

Principal Jones began his employment with appellee in July, 1978. In November of that year, he noted deficiencies in appellant's performance as referenced in a March 7, 1979 memorandum to appellant.[5] (Exhibit MM).

During the next school year, the principal placed appellant on a plan of assistance. (Exhibit LL). Jones listed deficiencies in the area of planning, organization, maintaining a clean and safe classroom environment, working with pupils who experienced difficulty in the class, consulting with parents, and updating student progress. The document included a general statement for the plan of assistance and the statement that: "Failure or unwillingness to improve and correct the above stated deficiencies will result in the recommending that changes (sic) be prepared for Mr. Bush's dismissal." A program to be followed to address the stated deficiencies was set forth. Jones testified that appellant successfully completed that plan. (STC Tr, pp 433, 434).

Appellant was placed on another plan of assistance during the 1980-81 school year. This time, in January, 1981, Jones stated that appellant did not adequately plan and organize the storage of equipment and materials needed for classroom use or adequately maintain a properly cleaned and safe classroom environment. (Exhibit JJ). The document also stated that failure and unwillingness to improve and correct the deficiencies "will result in the recommending that charges be prepared for Mr. Bush's dismissal."

On March 4, 1981, in the final evaluation on the plan of assistance, Jones stated that the unsatisfactory conditions outlined in the plan had been worked on and that it appeared the

problems had been or were in the process of being "placed in an acceptable condition," (Exhibit JJ). He then stated that the administration would continue to monitor appellant's teaching area, but hoped that no further "extensive assistance from the administration will be needed."

There is no evidence that appellant's performance was ever found deficient during his years of service in the district prior to Jones' arrival. Indeed, his evaluations from Jones' predecessor, Mr. Meulenbelt, and Assistant Principal Klinge had been satisfactory. (STC Tr, pp 153, 155).

Appellee argues that appellant's reliance on the plans of assistance to show motive or bad faith is misplaced. It contends that both plans were successfully completed and that appellant's services were satisfactory at the time of the layoff. (STC Tr, p 433).

Appellant also points to Principal Jones' role in the scheduling process to show that Jones was in a position to adversely affect appellant's assignment. He contends the opportunity existed for Mr. Jones to arrange the schedule so that fewer industrial arts courses would be offered and to purposely schedule teachers Lake and Drew in such a manner as to prevent appellant's full-time employment.

When a teacher alleges his or her employment was terminated in bad faith and not as a necessary reduction in personnel, this Commission has jurisdiction to determine whether the local school board took the action because of a bona fide necessity. Freiberg v Big Bay de Noc Board of Education, 61 Mich App 404, 414; 232 NW2d 718, 722 (1975). The controlling board has the burden of establishing the need to reduce personnel. Goodwin v School District of Kalamazoo (74-5-R, p 2). Thus, we must determine whether appellant's layoff was the result of a necessary reduction in personnel.

All industrial arts classes are electives. The number of elective classes offered and thus assigned to teachers to teach is determined by student interest. This "student driven process" used in appellee's high school typically begins in about the

middle to the end of February. High school counselors distribute to the students a list of all courses offered. Within one week to 10 days, students return to the counselors the pre-enrollment forms with their initial class selections. Totals are tabulated by computer and the results are given to Principal Jones. (STC Tr, pp 30, 31).

Mr. Jones then creates a rough schedule after determining the number of sections of the different courses to be offered and which teachers are to be assigned to those sections. (Deposition Tr, pp 5, 6, 22; STC Tr, pp 32, 33). After Jones creates the rough schedule, he and the counselors meet to address scheduling conflicts and to create the master schedule. (STC Tr, p 33). Usually, by mid-April, the tentative master schedule is completed.

Principal Jones testified that the student surveys received in the spring of 1981 showed that enrollment in industrial arts would decrease, resulting in the loss of industrial arts classes. (STC Tr, pp 438, 439). He testified that it would be almost impossible to manipulate a schedule. (STC Tr, pp 248, 249). Both high school counselors who worked with Jones in putting together the 1981-82 schedule testified that neither observed any indication of subterfuge or bad faith directed toward appellant on the part of the principal in the scheduling process. (STC Tr, pp 24, 25, 44, 45).

As we stated earlier, industrial arts enrollment figures dropped from 318 in 1980-81 to 237 in 1981-82. The following year, the figure rose to 248, but thereafter, at least through the 1987-88 school year, it never rose above 216. However, with the lowest industrial arts enrollment figure of 216 in 1983-84, Coe, Lake and Drew were all employed on a full-time basis with 13 industrial arts classes offered and Drew teaching two business classes.

Splitting Drew's assignment between industrial arts and business classes was a typical feature of his assignment. (Exhibit KK). Had Drew been assigned even one more business course for the 1981-82 school year, assuming some reduction in

industrial arts courses was necessary, appellant's position would have been reduced by only one course. The difference in gross pay between a full-time position and 4/5 was only $446. However, by reducing appellant's position to 3/5, he was to suffer a pay decrease of $6,000.[6] (STC Tr, p 217; Exhibit E, p 10). Both Superintendent Kenneth Harper and Mr. Jones testified that they were aware appellant was not likely to accept an assignment involving a large pay cut. (STC Tr, pp 347, 442). The following year, Drew was assigned two business courses and Coe was given a 4/5 assignment.

It appears from this record that student pre-enrollment forms were being turned in at almost the same time as appellant's final evaluation of his 1981 plan of assistance. (STC Tr, pp 30, 31). This timing, in and of itself, does not show a manipulation on the part of appellee. The record shows, however, that appellee continued to have significant concern over appellant's performance. This is supported by the 1981 final evaluation which stated that appellant's workplace would continue to be closely monitored, and by statements made by the superintendent, Dr. Harper, in an August, 1983 meeting, just after the arbitrator had ordered appellant's reinstatement.

At this meeting with appellant, Dr. Harper, and William Robertson, appellant's local association representative, Harper raised appellant's former evaluations and professional performance as a subject of concern. Both Robertson and appellant testified that Dr. Harper stated that the possibility of a tenure hearing had existed prior to appellant's layoff. (STC Tr, pp 124, 125, 167, 170). Appellant also testified that Dr. Harper stated appellant would be evaluated severely and treated as a new teacher upon his return to the classroom.

Although Dr. Harper denied threatening appellant with tenure charges at that meeting, he stated that he discussed evaluations and teacher performance generally. (STC Tr, pp 361, 362). He said he also discussed the importance of safety in work areas. Whether appellant was actually threatened or not, we find that, given the surrounding circumstances, it was not

unreasonable for him to perceive statements made to him as threats. Further, we find that questions about appellant's professional performance were still being considered well over a year after appellee now contends appellant had brought his performance to a satisfactory level. Thus, despite appellee's arguments to the contrary, we find that as the scheduling process was underway in the spring of 1981, appellee was not happy with appellant's performance. We further find that after three years of dissatisfaction with appellant, motive existed to discharge him. We find that the principal was in a position to make assignments and schedule courses in a way which could adversely impact appellant. And finally, the resulting schedule did adversely impact appellant.

Furthermore, this Commission also notes that both at the hearing and in its initial brief, appellee sought to place responsibility on appellant for a decline in industrial arts classes. However, the total of six metals and auto mechanics courses offered for the 1981-82 school year exceeded a full teaching assignment by one course. Thus, while fewer industrial arts courses were offered for the year, there were no fewer offered in the areas previously taught by appellant. Accordingly, Jones' testimony that appellant failed to stimulate student interest in taking his classes and that his having failed a high number of students impacted on enrollment is not borne out by the schedules. (See STC Tr, pp 424-426, 493;498, 530; Exhibit KK).

Finally appellee has cited the "Nation at Risk" report, the opening of the Ottawa Skills Center, and the fact that during the mid-1980's, one class was composed of a large number of girls as reasons for a decline in industrial arts enrollment. While these factors may have had some impact on enrollment figures, they do not specifically address the spring of 1981. Nor do they explain the upswings in course offerings which occurred until appellant wanted to return from sabbatical.

Appellant argues that, even assuming the reduction in industrial arts courses had been justified, he should not have been laid off. He contends that language in the collective

bargaining agreement in effect at the time of his layoff, and included in subsequent contracts, shows that he should not have been laid off, but rather should have been placed in a seventh or eighth grade position.

Article XIII section A (4) of the collective bargaining agreement between the Board and the Association states in pertinent part:

> (b) Probationary employees will be laid off first where any Teacher who has acquired any seniority and whose position has been curtailed is certified and qualified to perform the services of the probationary teacher. In the event seniority teachers must be laid off, layoff will be on the basis of seniority provided that the remaining staff is certified for that position. (Exhibits Q, R, S, T).

Appellant argues that under this language, the district erred by not placing him in a seventh or eighth grade position, because he was senior to teachers in some of those positions and because he held proper certification. (See STC Tr, p 204).

Appellee contends that appellant's interpretation makes no sense. Further, appellee argues that neither the union nor the school administration has ever interpreted Article XIII in the manner urged by appellant, but has always required that a teacher be certified and qualified for a position. Appellee points to the fact that the union never claimed such an interpretation when it filed a grievance on appellant's behalf, and that appellant even testified that his union representative had rejected his interpretation. (Exhibit CC; Bush 160, 161).

The contract states that to replace a probationary teacher, a teacher must be "certified and qualified" to perform the services of the probationary teacher. However, the word "qualified" is clearly omitted in reference to the layoff of "senior" (non-probationary) teachers. Moreover, on the subject of recall, Article VIII A (6) and (7) of the contract provide that a teacher whose services have been terminated as a result of a necessary

reduction in personnel shall be appointed to the first vacancy for which the teacher is "certified and qualified." (Exhibits Q, R, S, T). (Emphasis supplied).

Thus, the parties to the contract apparently understood the difference between the two terms. Nevertheless, they did not include the word "qualified" in the requirements for layoff among "senior" teachers as distinguished from probationary teachers. Seniority as the only qualification standard in a layoff situation involving non-probationary (tenure) teachers is not unusual.

Clear and unambiguous language of a contract is to be construed according to its plain meaning. Independence TWP v Reliance, 175 Mich App 48, 53; NW2d (1989). We find that the language is clear and unambiguous that non-probationary (tenure) teachers will be laid off in the order of seniority, provided they hold proper certification. Therefore, it is unnecessary to resort to interpretive aids such as past practice. Hoffman v Lake Penton Community Schools (86-23). In Hoffman we stated:

> [w]e recognize that some commentators in the labor law area argue that past practice should be allowed not only to interpret ambiguous contractual provisions but also where the intention of the parties was uncertain or incomplete, or when the proofs establish a mutual agreement to modify the contract. See, Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements (Published in Zack, Arbitration in Practice, ILR Press 1984).

We have already determined, however, that the contract language is not ambiguous. Furthermore, there is no persuasive evidence that the intention of the parties was uncertain or incomplete, or that there existed a mutual agreement to modify the contract. We conclude, therefore, that, even, assuming the reduction of the industrial arts position to a 3/5 assignment had been proper, appellee violated the collective bargaining agree-

ment by failing to place appellant in a seventh or eighth grade position.

It is well established that failure of a board to comply with the provisions of the collective bargaining agreement may be evidence of bad faith. Thorsen v Carrollton Public Schools (81-76). We conclude that appellee's failure to follow the collective bargaining agreement here shows bad faith. Our finding of bad faith is further supported by the timing of appellant's layoff — on the heels of the 1981 final evaluation for the plan of assistance — as well as evidence of events occurring after 1981-82. These other events include details surrounding appellant's entering into a sabbatical agreement at a time when he was awarded reinstatement.

At the meeting with Dr. Harper shortly after the arbitrator's award, Harper mentioned appellant's previous performance problems, and the subject of the possibility of tenure charges was raised. Dr. Harper stated that he told appellant that if he was considering a career change, "it might be a good time to do that." They also discussed whether he wanted to leave his position with a settlement. (STC Tr, pp 354, 355, 359). Following this discussion, the administration and appellant entered into the sabbatical agreement. (Exhibit F). During the year appellant was on sabbatical, teachers Drew, Lake, and Coe each had a full assignment. Drew taught two business courses and three industrial arts courses. Lake and Coe each taught five industrial arts courses.

The next year, when appellant said he wanted to return from sabbatical, only 10 industrial arts classes were offered, and only two industrial arts teachers - Drew and Lake - were employed to teach them. Coe went to elementary education, having earned his certification in that area. Appellant was advised that there was no position for him to return to and that he would remain on layoff. Appellant believes that under the direct terms of the sabbatical agreement, he was entitled to full employment upon his return. He contends that, provided no tenured teacher's rights would be violated, the district was

under a duty to manipulate the schedule in order to return him.

As appellant argues, the timing of this drop in course offerings, together with the timing of appellant's 1981-82 layoff, appear to be more than coincidental. Appellee was aware of appellant's desire to return from sabbatical, when the decision was made that three industrial arts teachers were no longer needed.

Finally, when an industrial arts teacher retired effective 1986-87, instead of recalling appellant, a teacher who had taught industrial arts in the district since 1969, Principal Jones concluded that appellant was not qualified to teach the woodworking portion of the assignment. Jones made this determination when he concluded, by reviewing appellant's transcripts on file at the tine, that appellant had never completed a woodworking class, which was required under North Central requirements.

Mr. Jones made this determination based on his review of appellant's transcripts, with no inquiry to the accrediting agency. (STC Tr, pp 514, 515). We find this noteworthy in light of the fact that Jones called the agency with a question regarding Coe's transcript to be sure that Coe would meet North Central's approval to teach auto mechanics. (STC Tr, pp 459-461, 475, 476). We also note that appellant offered to take a proficiency test in woodworking. North Central permits individual school districts to use proficiency testing, but appellee district did not utilize this option. (STC Tr, pp 478, 525).

For each claim made by appellant, appellee has attempted to show a legitimate educational purpose for its actions and has denied that it ever acted in bad faith toward appellant. However, examination of this record shows a pattern of exclusion covering over five school years. The evidence shows that appellant's performance as a teacher had been scrutinized and criticized for three years prior to his layoff — Mr. Jones' first three years at appellee district. Thus, the motive existed for the district to dismiss him.

Further, Mr. Jones had considerable control over the sched-

uling and was responsible for teacher assignments. Thus, the means to effectuate a reduction or elimination of an individual teacher's assignment was available. Moreover, assuming a reduction could be justified appellee failed to follow the terms of the collective bargaining agreement which would have allowed appellant to continue as a full-time teacher.

We find that had appellant been treated properly under the Act, he would not have been laid off for the 1981-82 school year but would have been fully employed as an industrial arts teacher or in a seventh or eighth grade position. Further, we find that he would have remained fully employed thereafter.

Based upon this record, we conclude that appellee has failed to establish that appellant's layoff for the 1981-82 school year was pursuant to a necessary reduction in personnel. Rather, we find that his layoff in 1981-82 was a subterfuge to avoid affording him protections guaranteed under the Tenure Act. We further conclude that subsequent actions taken by appellee regarding appellant's employment support our finding of bad faith. Accordingly, appellant's petition shall be granted.

Appellant has made a claim to alternative education courses which, although not necessary, we shall briefly address. He has contended that, assuming the reduction in industrial arts courses for the 1981-82 school year was proper, he should have been assigned to two alternative education classes which were taught by probationary teacher Kathy Fedewa, as a part of her full time assignment, in order to fill out his assignment.[7] We conclude that our ruling in Valesano v White Pine School District (78-47) applies, despite appellant's urging that the instant case is distinguishable. In Valesano, the Commission concluded that a controlling board of education is under no duty to sever an assignment held by a probationary teacher in order to give part of the assignment, for which a tenured teacher is certified and qualified, to the tenured teacher. Accordingly, appellant's claim to the alternative education courses is rejected[8]

ORDER

We have read the record and for the above stated reasons order the following.

It is ordered that appellant's petition is hereby granted.

It is further ordered that appellant be paid all salary lost subject to a determination thereof pursuant to Shiffer v Board Of Education Of the Gibraltar School District, 393 Mich 190, _____ NW2d ____ (1974).

/s/ Leonard M. Porterfield, Secretary
/s/ Wilbur L. Hass, Member
/s/ Patricia M. Montgomery, Member
/s/ Edward V. Sarkisian, Member
Dissenting Opinion: Donald F. Sugerman
DATED: August 30, 1989

[1] The facts stated in this decision are garnered from the pleadings, stipulations, and documents submitted by the parties and transcripts of the proceedings.

[2] Throughout these proceedings, the parties and witnesses referred to part-time positions as fractions of 5 and of 11 interchangeably. For purposes of this decision, we have used fractions of 5.

[3] Article IV, Section 1 of the Act provides in pertinent part:

> "Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided."

Section 5 provides:

> "Any teacher on permanent tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified."

[4] References to the transcript are denoted as STC Tr, p . ____ References to the deposition of Jarold Groters are denoted as Groters Dep, p ____. References to paragraphs of the Stipulation of Facts are denoted as Stipulation P _____.

[5] Appellant has referred to this memorandum as one of three plans of assistance. We find that it was not a formal plan of assistance.

[6] After appellant's layoff for 1981-82, Mr. Coe and Mr. Drew received $6,000 to spend on equipment and updating the auto shop. (STC Tr, pp 508, 544).

[7] One of the ways appellant says this assignment could have been accomplished was for appellee to grant a leave of absence requested by teacher Yvonne Bengelink, and then to reshuffle teacher assignments. We find that appellee was under no obligation to grant Ms. Bengelink's requested leave.

[8] Appellant's claim to the 4/5 position held by Coe in the 1982-83 school year was granted by the arbitrator under the terms of the collective bargaining agreement. However, had appellant's initial lay off been proper, Coe as an on-staff tenured teacher would have been entitled to the position under the Act. Page v Harbor Woods Public Schools (73-60-R); Starrs and VanHouten v Board of Education of the Linden Community Schools (82-33 and 82-54).

DISSENTING OPINION
DECISION AND ORDER

I am unable to agree with the conclusion reached by my colleagues that appellee board wrongfully reduced the hours of appellant Bush for the school year 1981-82, thereby constructively discharging him. The majority acknowledges that enrollment of industrial arts students declined by more than 25 percent over the prior year and it does not seriously question the reduction in industrial arts courses. Nevertheless, it concludes that the layoff of Bush, who had the least seniority among industrial arts teachers, was improper. It bases this conclusion on several factors that are briefly discussed below.

First, the majority says that the administration was in a position to gerrymander the course offerings in industrial arts

and implies that it did so in this case. The evidence does not support this "finding." On the contrary, the evidence supports the board's contention that the reduction in the number of classes was prompted solely by the fact that only 237 students elected industrial arts courses in 1981-82 whereas 318 had done so the previous year. This lower enrollment mandated that fewer than 15 courses be taught; not enough to give each of the three industrial arts teachers a full class load in this area.

Second, to find a constructive discharge the majority relies on the admission of administrators who opined that they did not think Bush would accept a large pay reduction that a 3/5 position for 1981-82 entailed. This was the class load available and their beliefs and opinions were immaterial. It is significant to note that the 3/5 position was sufficiently appealing to attract a teacher from outside the district.

Third, the majority finds that the board could have assigned two business courses to industrial arts teacher Drew as it had done once before, thus enabling Bush to have a full load of industrial arts classes. The problem with this finding, however, is that the record is silent on the availability of there being two such courses to assign to Drew.

Fourth, and perhaps my greatest concern, is the majority's finding that the board acted in bad faith because it disregarded the directive of the applicable collective bargaining agreement. It says that the clear and unambiguous language of that agreement required the board to assign Bush to teach seventh or eighth grade classes for which he was certified and for which he had greater seniority than incumbent tenured teachers.

The Commission, of course, has the right to interpret agreements to determine whether the Act has been violated. However, it must do so with extreme caution and circumspection. Here, it has reached a conclusion that appears to be contrary to the interpretation given to the provision by the parties themselves. And it has reached a conclusion that produces a seemingly absurd result.

The provision reads as follows:

> (b) Probationary employees will be laid off first where any Teacher who has acquired any seniority and whose position has been curtailed is certified and qualified to perform the services of the probationary teacher. In the event seniority teachers must be laid off, layoff will be on the basis of seniority provided that the remaining staff is certified for that position. (Exhibits Q, R, S, T).

While certified, Bush was not qualified to teach seventh or eighth grade classes. The board says, that the parties have always interpreted the agreement to mean that a tenured teacher can displace another teacher only if he or she is certified and qualified to teach the courses involved. There is no evidence to contradict the board's assertion that the union has joined in this position. Indeed the evidence suggests the validity of this assertion by the union's refusal to make this claim in prior grievances filed by Bush alleging that his 1981-82 layoff was improper.

Under the majority's interpretation, a tenured teacher who is certified but not qualified can displace another tenured teacher but cannot displace a probationary teacher. It seems strange that the board and union would give such a preference to a probationary employee! The parties are certainly entitled to enter into an agreement that produces this result, but I would hesitate to conclude that this is what they intended absent their direct input through evidence or stipulation.

Finally, I believe it is improper to rely on factors arising in subsequent years to support the finding concerning the board's action in 1981-82. For example, the majority cites a conversation between Bush and the superintendent in 1983 in which it "suggests" that Bush was threatened with tenure proceedings if he returned to work following an arbitration award. Without actually finding that a threat was made, the majority says it was not unreasonable for Bush to have perceived the statement as a threat.

This, it finds, is evidence of the board's bad faith in the initial layoff. It also concludes that the board's bad faith was evidenced by its refusal to return Bush to work the year after his sabbatical (1984-85) when only ten industrial arts courses were scheduled and two teachers with greater seniority were assigned to them.

While the board's action in 1981-82 is not beyond suspicion, I am unable to conclude from this record that its laying off Bush was improper and for that reason I would deny the petition.

/s/ Donald F. Sugerman, Chairperson

Majority Opinion:
Leonard M. Porterfield
Wilbur L. Hass
Patricia M. Montgomery
Edward V. Sarkisian

DATED: August 30, 1989

APPENDIX B

OPINION OF THE MICHIGAN TEACHER TENURE COMMISSION ON *PRO SE* MOTION FOR REHEARING

December 15, 1989

(Filed December 15, 1989)
STATE OF MICHIGAN
STATE TENURE COMMISSION

GERALD BUSH,
Appellant

v Docket No. 87-30-R

BOARD OF EDUCATION OF THE
ZEELAND PUBLIC SCHOOLS,
Appellee

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DECISION AND ORDER
APPELLANT'S MOTION FOR REHEARING

BACKGROUND FACTS

On August 30, 1989, the State Tenure Commission issued a decision and order granting appellant's petition. We found

that appellant's layoff for the 1981-82 school year was a subterfuge on the part of appellee board of education to avoid affording him protections guaranteed under the Tenure Act and that, but for this wrongful layoff, appellant would have remained fully employed by appellee for all relevant subsequent years.

On October 25, 1989, appellee school district filed a petition for review with the Ottawa County Circuit Court. On October 28, 1989, appellant, who has been represented by legal counsel throughout this tenure proceeding, filed a motion for rehearing on his own.[1] Appellant lists 21 "Reasons for Rehearing", many of which allege facts previously decided in his favor by this Commission. On November 8, 1989, appellee filed its response in opposition to appellant's motion.

ISSUE

Should appellant's motion for rehearing be granted?

Discussion

Our Rule 28 provides for motions for rehearing. We rely on the court rules in interpreting our rules. Rustin v Benton Harbor School District (85-8-2); Cunningham v Hanover-Horton Public Schools (78-8). Grounds for granting a new trial are listed in MCR 2.611. Appellant neither alleges that our decision is contrary to the great weight of of evidence, nor does he provide us with any other basis under which we might grant rehearing. MCR 2.611(A)(l)(e); Rustin, supra.

Appellant's motion fails to state grounds for granting rehearing. Therefore, appellant's motion is denied.

ORDER

We have read the record, and for the above stated reasons, we order the following:

Appellant's motion for rehearing is denied.

/s/Donald F. Sugerman, Chairperson
/s/Leonard M. Porterfield, Secretary
/s/Patricia M. Montgomery, Member
/s/Edward V. Sarkisian, Member
DATED: December 15, 1989

[1] Appellant's attorney was provided notice of this motion, as was appellee's attorney, by the tenure office on October 30, 1989.

APPENDIX C

OPINION OF THE
OTTAWA COUNTY CIRCUIT COURT

January 16, 1991

(Ordered January 16, 1990)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

BOARD OF EDUCATION OF THE
ZEELAND PUBLIC SCHOOLS,
Petitioner,

v

OPINION

GERALD BUSH,
Respondent,

File No. 89-11736-AA

and

STATE TENURE COMMISSION,
Respondent.

Board of Education of the Zeeland Public Schools petitioned for judicial review pursuant to the Administrative Procedures Act (MCL 824.201 et seq) and MCR 7.105, of a decision entered on August 30, 1989, by the Michigan State Tenure Commission in favor of Gerald Bush. A subsequent motion for rehearing filed with the Tenure Commission by Gerald Bush was denied by them on December 15, 1989. Respondent Bush then filed a cross petition for review in this court.

Petitioner alleges that the Tenure Commission erred as follows:

1. Its finding that Gerald Bush' layoff for the 1981-82 school year was based upon bad faith and subterfuge rather than because of a necessary reduction in personnel resulting from a substantial decline in enrollment for industrial arts courses, was not supported by competent material or substantial evidence on the whole record.
2. Its finding that petitioner violated the collective bar-

gaining agreement between petitioner and the union is erroneous as a matter of law.

3. Its finding that petitioner's interpretation and application of provisions of the collective bargaining agreement in accordance with past practice agreed to by both parties was a bad faith violation of the collective bargaining agreement is an unlawful abuse of discretion.
4. Its finding that petitioner violated the collective bargaining agreement required that it determine priorities as between tenured teachers, is beyond its jurisdiction and legally erroneous.
5. Its decision would have required petitioner to manipulate class schedules and assignments to accommodate Gerald Bush.
6. It erroneously substituted its own concepts of how to adjust to lower enrollments for the decision of the Board of Education charged with that function and duty.
7. It erred by requiring petitioner to manipulate the class assignments of a senior industrial arts teacher to a class in another department without evidence that such other class assignment was available.
8. Its finding that efforts to correct past deficiencies in Gerald Bush' performance constituted bad faith and subterfuge were erroneous.
9. It failed to place the burden of proving subterfuge on Gerald Bush.
10. It erred in failing to rule on petitioner's claim of laches.

Gerald Bush (hereinafter called "Bush") began employment with the Board of Education of Zeeland Public Schools (hereinafter referred to as Zeeland Schools), on September 2, 1969 as a certified teacher, and has taught industrial arts courses exclusively, from 1969 through the 1980-81 school year. Bush has been tenured since 1971. As of the 1980-81 school year Zeeland Schools employed three industrial arts teachers includ-

ing Bush, who had least seniority amongst the three teachers. Industrial arts classes are elective. The number and type of industrial arts classes in any year depend upon student enrollment. Industrial arts was the only postion for which Bush was qualified. Student surveys in the spring of 1981 disclosed a substantial drop in industrial arts enrollment for the 1981-82 school year. In fact, industrial arts enrollment fell from 318 students in 1980-81 to 237 students in 1981-82, a drop of 81 students or 25%. Fifteen industrial arts courses were offered in 1980-81, with an average class size of 21. If average class size were to remain constant, the lower enrollment would call for 11 courses instead of 15. Bush was verbally notified of the anticipated reduction of his position from fulltime (5 courses) to a three-fifths position (3 courses) for the 1981-82 school year because of reduced student enrollment and Bush' low seniority position in the industrial arts department. This was implemented, first by a letter of layoff, followed by a recall to a seven-elevenths position. Bush chose to decline the recall while preserving future recall rights. It is significant to note that part of the impact of the lower enrollment was absorbed by reducing class size and part by assigning Mr. Drew to teach one course in the business department, rather than by imposing the full burden on Bush, which could have reduced his position to a one-fifth position teaching only one course. The union grieved Mr. Bush' layoff, but withdrew the grievance. Union witnesses testified that they couldn't find other classes that Bush should have had (Lathers T page 336), and that they found no evidence of subterfuge, manipulation, or bad faith as to Mr. Bush (Robertson T page 133).

After Bush rejected the three-fifths position for 1981-82, Zeeland Schools employed Doug Coe, a laid-off tenured, qualified industrial arts teacher previously employed by the West Ottawa Public Schools, to fill the three-fifths industrial arts position for 1981-82. Mr. Coe was granted tenure by Zeeland Schools effective June 14, 1982. During the 1982-83 school year, Mr. Coe filled a four-fifths industrial arts position. Bush

grieved the Zeeland Schools failure to offer him the four-fifths position for the 1982-83 school year. The arbitrator awarded Bush reinstatement with full seniority but without back pay. Said decision was not appealed. Bush and Zeeland Schools entered into a sabbatical leave agreement for the 1983-84 school year. All ten industrial arts courses during the 1984-85 and 1985-86 school years were taught by Mr. Drew and Mr. Lake. Both of said persons were tenured teachers with more seniority than Bush. Mr. Drew retired at the end of the 1985-86 school year. Written correspondence between Zeeland School representative Jones and Bush took place in May and June 1986, concerning the necessity that Bush have taken a woodworking course to be qualified to fill Mr. Drew's position. Bush had been placed on plans of assistance in the 1979-80 and 1980-81 school years to remedy performance deficiencies. He completed said plans to the satisfaction of Zeeland Schools' principal Michael Jones.

The keystone of the Tenure Commission majority decision is their holding that Zeeland Schools violated the "clear and unambiguous" language in the last sentence of Article XIII, section A (4) of the collective bargaining agreement by laying off Bush during the 1981-82 school year.

Provisions of Article XIII - Reduction of Personnel - which are relevant to this case read as fcllows:

A. The following provisions shall apply to a necessary reduction in personnel:

(l) The Board, realizing that education to a large degree, depends upon the financial resources available to the Board as provided by the local public and the State of Michigan, and in accordance with this realization, understands that in some instances it may be economically necessary to reduce the educational program and subsequently the staff when funds are not available.

(2) It is hereby specifically recognized that it is within the sole discretion of the Board of Education to

reduce the educational program and the staff when economic necessity dictates.

...

(4) In order to promote an orderly reduction in personnel when the education program is curtailed the following procedure shall be used:

...

(b) Probationary employees will be laid off first where any Teacher who has acquired any seniority and whose position has been curtailed is certified and qualified to perform the services of the probationary teacher. In the event seniority teachers must be laid off, layoff will be on the basis of seniority provided that the remaining staff is certified for that position.

...

(6) Any teacher in the Zeeland Public Schools whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which he is certified and qualified.

(a) Certification shall be defined as: Possessing a provisional or permanent certificate appropriate to the teaching level.

(b) Qualified shall be defined as: Possessing a major or a minor appropriate to the teaching assignment, as well as sufficient number of credit hours in that academic area to meet accrediting agency standards."

The Tenure Commission majority decided that the collective bargaining agreement dictated that the layoff of tenured teachers would be solely on the basis of seniority if certification existed, without regard to the teacher's qualifications for the

"teaching assignment" or "position" involved.

Dissenting chairperson Sugarman observed appropriately that said ruling produced a "seemingly absurd result" that an "unqualified" tenured teacher could displace a qualified tenured teacher with less seniority, but could not displace a qualified probationary teacher.

The contract definition of "certification" is in terms of a teaching "level". "Qualification" is defined by the contract in terms of the "teaching assignment". The layoff proviso requires certification "for that position". We believe that reference to a "position" by its common meaning should be defined as a "teaching assignment" rather than as a "grade level".

MSA 15.41231 (section 1231 of the School Code of 1976), states in part as follows:

> "The board of a school district shall hire and contract with qualifled teachers".

When possible, collective bargaining agreements should be interpreted consistently with state law. In case of conflict, state law controls such an agreement.

Even if we were to ignore the statutory mandate requiring qualified teachers, use of the work (sic) "position" rather than grade "level" in the contract, at the very least gives rise to an uncertainty or ambiguity which properly can be resolved by evidence as to the past practice of the parties in interpreting and applying that language. In this case, the uncontroverted evidence is that both parties interpreted the language as requiring qualification to teach the position before a tenured teacher could be displaced by another tenured teacher with greater seniority.

The case of Pekar v Local Union Number 181 International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, AFL-CIO, 311 F2d 628 (1962) states on pages 636 and 637 as follows:

> "(3) When parties by their uniform conduct

over a period of time have given a contract a particular construction, such construction will be adopted by the courts. Chesapeake & Ohio Railway Co. v Michigan Public Service Commission, 347 Mich 234, 240, 79 NW2d 586.

'The construction of a contract which the parties have given it while operating thereunder, should be followed,' Franklin Fire Ins. Co. v Chesapeake & Ohio Railway Co., 140 F2d 898, 899 (C.A.6)

Plaintiffs are residents of Michigan and were employed there, and the collective bargaining agreement was made in Michigan. This Court has held under like circumstances that the law of Michigan is important, if not indeed controlling. Union News Co. v Hildreth, 6 Cir 295 F2d 658, 663. In the same case, the Court quoted with approval the language of the Michigan Supreme Court in the case of Cortez v Ford Motor Company, 349 Mich 108, 84 NW2d 523, as follows:

'Our Court has repeatedly held that proper exercise of such discretion over grievances and interpretation of contract terms in the interest of all its members is vested in authorized representative of the Union subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud.' 349 Mich 108, at page 121, 84 NW2d 523, at page 529."

The court went on to state on page 638 as follows:

> "Defendants construed the contract in the same manner that it had been construed by the Company and by the Local Union for a period of some nine or ten years and the language in the 1958 contract with respect to seniority was identical with that in the preceding contracts over the entire period of time."

The case of Stark v Budwarker Inc., 25 Mich App 305 on page 314 emphasizes the importance of determining the intent of the parties to a contract, as follows:

> "If we can give effect to the intention of the parties - and we can - we should do so rather than exalt a 'literal' reading, one not at all inconsistent with that intention, to a higher status than the understanding and agreement of the parties themselves.
>
> Professor Corbin warns that when judges attempt to enforce a contract according to their understanding of what is "plain and clear" they run the risk of substituting their own linguistic education and experience for the intent of the parties thereby 'making a contract for the parties,' one which they did not make."

The Tenure Commission majority violated the above principles of law in interpreting the collective bargaining agreement in this case.

It is clear that the school district may establish teacher qualification criteria. Chester v Harper Woods School District, 87 Mich App 235, 245-6 (1978)

In our case the collective bargaining agreement does establish teacher qualification criteria.

It is acknowledged that Bush was not qualified to teach 7th or 8th grade classes. The Tenure Commission majority faults the Zeeland Schools for not assigning Bush to a position he was not qualified to teach. They further determined that Zeeland Schools failure to follow the terms of the collective bargaining agreement "shows bad faith''. It is incongruous that the Tenure Commission majority should choose to interpret the collective bargaining agreement so as to require the school board to hire an unqualified teacher to displace a qualified tenured teacher, an action which would be improper with respect to a probationary teacher.

The Michigan Supreme Court case of Boyce v Royal Oak Board of Education, 407 Mich 312, (1979), had occasion to interpret the policy which gave rise to the Teacher Tenure Act. The court stated on pages 322 and 324 in part as follows:

> "Even a tenured teacher can be dismissed based on a necessary reduction in personnel, MCL 38.105; MSA 15.2005. We cannot in good conscience say that the phrase "shall be employed" in MCL 38.33; MSA 15.1983 was intended to afford probationary teachers greater protection than tenured teachers possess under MCL 38.91 et seq; MSA 15.1991 et seq."
>
> "In short, the rights of probationary teachers would be greater than those of tenured teachers. We find that that was not the intention of the legislature."

The Tenure Commission majority's determination that Zeeland Schools violated the collective bargaining agreement terms concerning layoff was an error of law.

Furthermore, their inference of "bad faith" from Zee-

land Schools' violation of the collective bargaining agreement (see Tenure Commission decision and order on page 15), when all evidence indicated consistent past practice and interpretation by both contracting parties to require qualification to teach the position as a condition precedent to displacing a tenured teacher, was an abuse of discretion.

The Tenure Commission majority improperly considered events which occurred substantially after the layoff to decide that the layoff was the result of bad faith. Events later in time were irrelevant to the propriety of the layoff.

The Tenure Commission majority also relied upon the timing of the layoff in relation to the completion of Bush' 1981 plan of assistance as evidence of bad faith.

On June 10, 1981, Bush, and two other teachers, were formally notified of the layoff. On June 24, 1981, Bush was notified of his recall to a seven-elevenths position. On July 6, 1981, Bush rejected the part-time position, but reserved his right of recall to any position for which he was certified and qualified.

There was no evidence that June of a given year was not a usual or appropriate time to act with respect to necessary layoffs.

Evidence established that Bush satisfactorily completed both the 1979-80 and 1980-81 plans of assistance. The Tenure Commission majority seemed to be saying that a teacher who previously has needed assistance, cannot be laid off even if a substantial enrollment decline requires a reduction in course offerings and in staff. Such a position is unwarranted and invalid.

All evidence as to possible manipulation of courses and schedules, by Zeeland Schools, to Bush's detriment, was negative.

We note that chairperson Sugarman's dissenting opinion was well reasoned and soundly based.

There was no credible, competent, material, or substantial evidence in the whole record of subterfuge as to Bush' layoff. Union representatives found no such evidence and withdrew

their grievance as to Bush. They found no classes Bush should have had, and no subterfuge.

The case of Garden City Board of Education v Brisbois, 164 Mich App 74, 79, 81 (1987), dealt with a claim of subterfuge.

The court of appeals panel affirmed a circuit court decision reversing a decision by the Tenure Commission which held that the layoff was a subterfuge to avoid Tenure Act protections. The court of appeals found that there was no evidence to support the Tenure Commission finding that the board knew of available vacancies at the time of layoff.

The court, on page 81, went on to say that the board laid off appellants in good faith at a time when all parties involved knew that certain layoffs were inevitable.

In our case there was no evidence of any additional courses available for assignment to Bush which he was qualified to teach. The reasoning of the Garden City case applies with equal force in our case.

The major decline in industrial arts enrollment required some course cutbacks and adjustments. The full burden of the problem was not placed on Bush, but it was reasonable that as the industrial arts teacher with the least seniority, his course load was reduced. The Tenure Commission majority's decision is erroneous as a matter of law and is not supported by competent, material and substantial evidence on the whole record.

Reference by the Tenure Commission majority to issues which arose in later school year was inappropriate because each was fully resolved either by decision or by agreement. 1982-83 issues were resolved by the grievance decision. The parties executed a sabbatical agreement for the 1983-84 year. During the 1984-85 and 1985-86 school years, no vacancy existed in any position that Bush was qualified to teach. 1986-87 issues were resolved by agreement between the parties whereby Bush was placed in an alternative education position with Zeeland Schools.

Bush's cross petition for review seeks to reopen the Tenure

Commission hearing for additional evidence and seeks to challenge portions of the stipulation of facts filed with the Tenure Commission in the original proceeding, which was executed on his behalf by his attorney of record. Bush advanced no sufficient reason why said matters could not or should not have been addressed by him in the initial proceedings. Bush and his attorney had full opportunity to present his case to the Tenure Commission. We affirm the denial by the Tenure Commission of Bush's motion for rehearing.

For the reasons stated herein and which appear in the dissenting opinion of chairperson Sugerman, the majority decision of the Tenure Commission is reversed. Bush' petition is denied.

An order shall be submitted in accordance with the foregoing opinion.

Dated: January 16, 1991.

/s/James E Townsend
Circuit Judge by Assignment

APPENDIX D

ORDER OF THE MICHIGAN COURT OF APPEALS TO DENY LEAVE TO APPEAL

July 19, 1991

Court Of Appeals, State of Michigan
ORDER

Zeeland Public Schools v Gerald Bush

Docket # 138192
L. C. #89-011736 AA

Mark J. Cavanagh
Presiding Judge

John H. Shepherd
E. Thomas Fitzgerald
Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

Judge Shepherd would GRANT the application for leave to appeal.

/s/Mark J. Cavanagh

A true copy entered and certified by Daniel F. Walsh, Chief Clerk, on JULY 19, 1991.

/s/Daniel F. Walsh
Date Chief Clerk

APPENDIX E

ORDER OF THE MICHIGAN COURT OF APPEALS TO DENY REHEARING OF DENIAL OF LEAVE TO APPEAL

September 30, 1991

Court of Appeals, State of Michigan
ORDER

ZEELAND PUBLIC SCHOOLS v GERALD BUSH
Docket #138192
89-011736 AA

Mark J. Cavanagh
Presiding Judge

John H. Shepherd
E. Thomas Fitzgerald
Judges

The Court orders the motion for rehearing of order is DENIED.

Judge Shepherd would GRANT rehearing and would grant leave to appeal as stated in the dissent in the Court's original order.

/s/Mark J. Cavanagh

A true copy entered and certified by Daniel F. Walsh, Chief Clerk, on Sept. 30, 1991. /s/Daniel F. Walsh
Date Chief Clerk

APPENDIX F

ORDER OF THE MICHIGAN SUPREME COURT TO DENY LEAVE TO APPEAL

April 24, 1992

Michigan Supreme Court
Lansing, Michigan

ORDER
Entered: April 24, 1992
92608

BOARD OF EDUCATION OF THE ZEELAND PUBLIC SCHOOLS,
Petitioner-Appellee,

V

GERALD BUSH,
Respondent-Appellant,

SC: 92608
COA: 138192
LC: 89-011736-AA
Tenure Comm No.: 87-30

STATE TENURE COMMISSION,
Respondent.

Michael F. Cavanagh, Chief Justice
Charles L. Levin, James H. Brickley, Patricia J. Boyle,
Dorothy Comstock Riley, Robert P. Griffin,
Conrad L. Mallett, Jr.
Associate Justices

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

30421 April 24, 1992

/s/Corbin R. Davis
Clerk

APPENDIX G

ORDER OF THE MICHIGAN SUPREME COURT TO DENY REHEARING OF DENIAL OF LEAVE TO APPEAL

July 31, 1992

Michigan Supreme Court
Lansing, Michigan

Order
Entered: July 31, 1992
92608(21)

BOARD OF EDUCATION OF THE
ZEELAND PUBLIC SCHOOLS,
Petitioner-Appellee,
V

SC: 92608
COA: 138192
LC: 89-011736-AA
Tenure Comm No.: 87-30

GERALD BUSH,
Respondent-Appellant,

STATE TENURE COMMISSION, Respondent.

Michael F. Cavanagh, Chief Justice
Charles L. Levin, James H. Brickley, Patricia J. Boyle,
Dorothy Comstock Riley, Robert P. Griffin,
Conrad L. Mallett, Jr.
Associate Justices

On order of the Court, the motion for reconsideration of this Court's order of April 24, 1992 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certfy that the foregoing is a true and complete copy of the order entered at the direction of Court.

40728 July 31, 1992

/s/Corbin R. Davis
Clerk

APPENDIX H

NEWS ARTICLE DATED

December 8, 1992

Judge orders citizen to take down signs

GRAND HAVEN

By Adam Blust
The Grand Rapids Press

Quoting Abraham Lincoln and displaying his credentials as a World War II veteran, George Zysk told 20th Circuit Court Judge Calvin Bosman Monday he fought for the freedom to place signs in his yard at 606 Jackson St.

Bosman didn't see it quite that way.

"This case is not questioning the patriotism of Mr. Zysk or his right of free speech," Bosman said as he sentenced Zysk to pay $200 in court costs and take the signs down from his front and side yards.

Monday's hearing was just the latest round in a three-year court fight between Zysk and city officials, who say the signs with political and social messages violate city sign ordinances and are a nuisance to area property owners. In August 1990, the city's lawsuit was settled in a consent judgment, where Zysk agreed to remove the signs from his front yard.

Since then, the signs have gradually reappeared in both Zysk's front and side yards, and the city went back to court. A few weeks before the November general election, Zysk's house, yard and front steps were nearly obscured by political signs.

Zysk has said that the city's sign ordinance is unconstitutional because it deprives him of his right to free speech. In a prepared statement to the court, Zysk asked that the complaint against him be dropped and that he be awarded $100,000 from the city for the pain and suffering the court battle has caused him.

But Bosman ruled that Zysk was clearly in violation of the earlier judgment, and had committed another offense with signs in his side yard. Bosman ordered Zysk to pay court costs and remove the yard signs within two weeks.

After Bosman passed sentence, Zysk asked if the $200 in court costs could be converted to jail time or community service. Bosman said that option might be considered at a later time.

Outside the courtroom, Zysk said he would be removing his signs.

"I think I've accomplished my mission" of informing people about pressing political issues, he said.

Zysk's self-confessed obsession with sign making, including coveting the wooden slats of his house with lettering, has attracted attention far outside Grand Haven. A group of art collectors in Chicago and elsewhere have hailed his signs as art, and noted fans of "outsider and intuitive art" such as Chicago Reader publisher Bob Roth have George Zysk creations in their collections.

City Councilman Dennis Swartout, a critic of Zysk's signs, said Monday he doesn't think the battle with Zysk is over.

"While I respect Mr. Zysk's efforts to fight for his First Amendment rights, the city has an obligation to the taxpayers to uphold the ordinances of the city," Swartout said.

Assistant City Attorney Rod Scherner said he is satisfied with Monday's outcome.

"We got the case decided. We'll see if Mr. Zysk keeps his end of the agreement," Scherner said.

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

No. 92-1167

In The

Supreme Court of the United States

October Term, 1992

GERALD D. BUSH,

Petitioner,

v.

ZEELAND PUBLIC SCHOOLS,
MICHIGAN STATE TENURE COMMISSION,
STATE OF MICHIGAN,

Respondents.

Pro Se Petition For A Writ Of Certiorari To The Michigan Supreme Court

RESPONDENT ZEELAND PUBLIC SCHOOLS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion to review the reversal by the Michigan courts of a clearly erroneous decision of the Michigan Tenure Commission where there are no substantial federal issues properly before this Court, and the state law issues have no national applicability or significance?

II. Whether this Court should exercise its discretion to review the reversal by the Michigan courts of a clearly erroneous decision of the Michigan Tenure Commission where the state law issues were decided fairly and correctly by the Michigan courts, in accord with applicable Michigan law?

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STATEMENT OF THE CASE

Despite what one would gather from petitioner's statement of the case, the essential facts of this case are simple and largely undisputed. In the 1980-81 school year petitioner Gerald Bush was employed as a high school industrial arts teacher by respondent Zeeland Public Schools. Industrial arts was the only available position for which he was both certified by the State of Michigan and qualified as that term is defined by the collective bargaining agreement and accrediting agency standards. Of the three industrial arts teachers at Zeeland High School, Mr. Bush had the least seniority. (Ex. U)[1] Because industrial arts is an elective course, the number of classes offered is determined solely by student interest.

In the spring of 1981 student surveys revealed that industrial arts enrollment for the coming 1981-82 school year would drop dramatically. (Tr. 438-439) In fact, industrial arts enrollment fell from 318 students in 1980-81 to 237 students in 1981-82, a decline of 25%. (Ex. KK) Solely as a result of that decline in enrollment, and because Mr. Bush was the least senior industrial arts teacher, his position was reduced from full time to a three-fifths position. He refused to take the three-fifths position, and he was placed on layoff status. (Ex's. A-C) The Zeeland teachers' union grieved the layoffs of Mr. Bush and two other teachers, but the union found no basis for asserting that Mr. Bush's layoff was in any way improper, and the

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[1] References are to the transcript ("Tr.") of testimony taken and exhibits ("Ex.") entered during the Tenure Commission hearing of May 3-5, 1988.

grievance was withdrawn prior to arbitration. (Ex's. CC, DD; Tr. 133, 338)

Another teacher was hired to teach the three-fifths industrial arts position for the 1981-82 school year, and at the end of that school year that teacher had gained tenure. Accordingly, he continued to fill that position (which had then become a four-fifths position) for the 1982-83 school year. Mr. Bush and/or the teacher's union grieved the fact that the school district had not recalled him. The arbitrator ruled that pursuant to the collective bargaining agreement Mr. Bush should have been recalled. (Ex. E) Mr. Bush was therefore offered an industrial arts position for the 1983-84 school year, but he instead requested and was granted a sabbatical leave. (Tr. 254; Ex. F) Mr. Bush was advised by the Superintendent of Schools that he should take college courses during the sabbatical which would qualify him to teach other subjects, thereby increasing his employability, and that the school district would pay for those college courses. (Tr. 139-140; 261; 354-357) For whatever reason, Mr. Bush did not do so.

Student interest in industrial arts courses continued to drop significantly for the 1984-85 school year (enrollment declined to only 194 students), and the ten industrial arts classes were taught by the two industrial arts teachers senior to Mr. Bush. (Tr. 467-468; Ex. KK) Because Mr. Bush lacked the certification and qualification necessary to teach any other available course, he was again laid off for the 1984-85 school year. He protested that layoff, and he was offered the chance to immediately arbitrate his protest, but he chose not to do so (Ex's. AA, EE), and he remained on layoff through the 1985-86 school year.

In November, 1986, as part of a settlement of yet another grievance, Mr. Bush was recalled to an alternative education teaching position (Ex. O), and he remains to this day fully employed by the Zeeland Public Schools.

In October, 1987, over six years after his 1981 layoff, Mr. Bush filed a petition with the Michigan Teacher Tenure Commission challenging his layoff for the 1981-82 school year and the subsequent events up to the time of his recall. (Mr. Bush's Petition to the Tenure Commission is included as Appendix A.) That petition alleged two assignments of error. Mr. Bush claimed that (1) since the 1981-82 school year, the Zeeland Public Schools had failed to recall him to vacancies held by probationary teachers and/or for which he was certified and qualified; and (2) since the start of the 1981-82 school year the school district had constructively demoted and discharged him under the guise of necessary reductions in personnel by manipulating course offerings, class schedules, and teaching assignments without a legitimate educational basis, arbitrarily, capriciously, and in bad faith, all allegedly in violation of Article IV of the Michigan Tenure Act, M.C.L. 38.101, *et seq.*

Significantly, Mr. Bush made no claim that he had been laid off because he had exercised his First Amendment rights or that his First Amendment rights had been violated in any way. Nor did he make any claim that he had been discriminated against because he was not a member of the teachers' union. Mr. Bush has never filed either a claim with the Michigan Employment Relations Commission or the National Labor Relations Board or a lawsuit against the teachers' union claiming unfair representation.

A full evidentiary hearing was held on May 3-5, 1988 before a hearing officer of the Tenure Commission. Although Mr. Bush testified at length during that hearing, he made no claim that his First Amendment rights had been violated. In a Decision and Order dated August 30, 1989, the State Tenure Commission, by a four-to-one vote, granted Mr. Bush's petition and ordered the Zeeland Board of Education to pay all lost salary, the amount to be determined by a subsequent hearing. The Commission majority made the following finding:

> We find that had appellant been treated properly under the Act, he would not have been laid off for the 1981-82 school year but would have been fully employed as an industrial arts teacher or in a seventh or eighth grade position. Further, we find that he would have remained fully employed thereafter.

(See Appendix to Petition for Writ of Certiorari, p. 16a.) The Tenure Commission Chairperson filed a vigorous dissent.

In reaching its decision, the Tenure Commission majority committed numerous errors of Michigan law, the most significant of which were the following:

> 1. The Tenure Commission majority implicitly found that school district administrators had manipulated the course offerings and schedule to Mr. Bush's detriment. That finding was insupportable, because everyone who testified stated unequivocally that there was no such manipulation. For example, Mr. Bush called as his witnesses the high school counselors who participated in developing the course offerings and schedule. They testified there was no

manipulation whatsoever, and that the schedule was prepared solely to benefit the maximum number of students. The Commission majority simply ignored the undisputed fact that industrial arts enrollment had dropped 25%, which necessarily led to fewer industrial arts classes and a three-fifths position for the least senior industrial arts teacher, who happened to be Mr. Bush.

2. The Tenure Commission majority held that the school district had erred by *not manipulating* the schedule in Mr. Bush's favor. According to the Commission, the district was obligated in 1981-82 to keep Mr. Bush in a full time industrial arts position by assigning unspecified business classes to one of the more senior industrial arts teachers. This finding was erroneous for two reasons. First, there was no evidence that there were any such classes available without ousting other tenured teachers or disrupting the schedule. Second, under clearly established Michigan tenure law there was no obligation on the part of the school district to manipulate class offerings to favor Mr. Bush at the expense of other teachers. That body of established Michigan law was simply ignored.

3. The Tenure Commission majority also held that the school district had been obligated to retain Mr. Bush as a full time teacher by assigning him to seventh and eighth grade non-industrial arts positions for which he was certified but *admittedly not qualified* (Tr. 214-215), and bumping the tenured and qualified (but less senior) teachers who were already holding those positions. To reach this bizarre result, the Tenure Commission majority had to reach an absurdly

> strained interpretation of the collective bargaining agreement between the school district and its teachers' union. Among the many problems with this forced interpretation was that it ran directly counter to how the parties to the collective bargaining agreement had themselves always interpreted its provisions, which was to require that a teacher be both certified and qualified for a position. According to the Tenure Commission majority, however, because the school district continued to follow the parties' consistent interpretation of their own collective bargaining agreement and refused to displace the incumbent tenured teachers, all of whom were qualified, in favor of Mr. Bush, who was not qualified, the school district had been guilty of bad faith, a patently absurd result.

The Tenure Commission errors must have also been apparent to Mr. Bush, because on October 28, 1989, even though he had prevailed, he moved the Tenure Commission for a rehearing, which the Commission denied. Nowhere in his motion for a rehearing did Mr. Bush claim a denial of his First Amendment rights or discrimination by the school district because of his non-union status.

The Zeeland Public Schools appealed the Tenure Commission decision to the Ottawa County Circuit Court, and Mr. Bush cross-appealed the Tenure Commission's denial of his motion for rehearing. By opinion of January 16, 1991 and order of February 5, 1991, the circuit court reversed the Tenure Commission's decision and remanded to the Commission with instructions to enter an order denying Mr. Bush's petition, and affirmed the Commission's December 15, 1989 decision denying Mr.

Bush's motion for rehearing. The circuit court found several reversible errors in the Tenure Commission's majority decision, the two most important being the following:

> 1. There was no credible, competent, material or substantial evidence, as required by Michigan law, of any subterfuge in Mr. Bush's layoff, which the evidence established had resulted solely from a decline in industrial arts enrollment.
>
> 2. The Tenure Commission had misinterpreted the provisions of the collective bargaining agreement, had committed an error of law by refusing to consider the parties' own interpretation to that agreement which required all teachers to be qualified, and had abused its discretion in finding "bad faith" on the part of the school district for having merely followed the parties' consistent and reasonable interpretation of the agreement.

Mr. Bush sought leave to appeal the circuit court's decision to the Michigan Court of Appeals, which was denied by a two-to-one vote on July 19, 1991 and rehearing denied on September 30, 1991. The Michigan Supreme Court denied leave to appeal on April 24, 1992 and denied rehearing on July 31, 1992.

REASONS FOR DENYING THE WRIT

As shown below, petitioner has asserted no legitimate basis for this Court to exercise its extraordinary and discretionary jurisdiction.

I. THIS COURT SHOULD NOT GRANT PETITIONER'S PETITION SIMPLY BECAUSE HE IS PROCEEDING PRO SE.

Petitioner argues that this Court should grant his petition solely for the reason that he is a *pro se* litigant. This argument is fallacious, both factually and legally, and petitioner's petition is entitled to neither greater nor lesser consideration because he has chosen to proceed *pro se*.

The Court should first realize that Mr. Bush has not been proceeding *pro se* throughout the course of this matter. At critical stages he has been represented by counsel. At the Tenure Commission level, where Mr. Bush prevailed, he was represented by an experienced school law attorney. That attorney withdrew at the circuit court appeal level only after Mr. Bush had ignored his attorney's advice and moved *pro se* for a Tenure Commission rehearing, stating that the Tenure Commission majority decision in his favor contained "some errors", thereby seriously undermining the credibility of that decision.

Mr. Bush contends that he was "abandoned" and the circuit court erred in granting the attorney's motion to withdraw, even though Mr. Bush was at that time himself asserting to the circuit court that the attorney had a conflict of interest. (See Petition for Writ of Certiorari, p. 27).[2] Mr. Bush fails to note that the circuit court granted him an extension of time to file briefs, and that by the

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[2] Mr. Bush has now sued his original attorney for malpractice, which reflects the extent to which the attorney-client relationship had broken down.

time of the oral argument before the circuit court Mr. Bush had retained another attorney to represent him. That new attorney did not seek from the circuit court either a further continuance or leave to file any supplemental briefs. That same attorney represented Mr. Bush in the application for leave to appeal to the Michigan Court of Appeals.

Mr. Bush also claims that his arguments have been ignored by the lower courts because he was proceeding *pro se*. That claim fails in light of the fact that at every lower level except the Michigan Supreme Court Mr. Bush has been represented for at least some time by counsel. The mere fact that his arguments were rejected does not mean that they were not considered, it means only that they lacked merit.

The Court should also remember that Mr. Bush has been a full time employee of the respondent school district since November, 1987, now earning in excess of $45,000 annually. This is not a case of forced *pro se* representation because of indigency.

Finally, although there is a constitutional right to proceed *pro se*, that right does not also confer a license to ignore procedural rules or an exemption from substantive legal requirements. *Faretta v. California*, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 2541 n. 46 (1975); *McKaskle v. Wiggins*, 465 U.S. 168, 183-184, 104 S.Ct. 944, 954 (1984), *reh. den.*, 465 U.S. 1112, 104 S.Ct. 1620 (1984), *on remand*, 729 F.2d 1026 (5th Cir. 1984), *aff'd*, 753 F.2d 1318 (5th Cir. 1985). Mr. Bush is not entitled to receive any elevated status because he has chosen to represent himself before this Court.

II. THIS CASE INVOLVES ONLY ISSUES OF MICHIGAN LAW WHICH HAVE NO NATIONAL APPLICABILITY OR SIGNIFICANCE.

As shown below, this case turns entirely on principles of Michigan tenure law, administrative agency law, and contract law. There are no federal statutory or constitutional issues legitimately before this Court. The principles of Michigan law which are involved are unique to Michigan and have no national applicability or significance. There is simply no reason for this Court to invoke its discretionary jurisdiction.

III. PETITIONER'S FIRST AMENDMENT CLAIMS WERE NOT RAISED OR DECIDED BELOW AND ARE NOT PROPERLY BEFORE THIS COURT.

Petitioner would have this Court believe that in 1981 the respondent school district reduced his position to a three-fifths position (which he chose to decline, instead going on layoff), because he had exercised his First Amendment rights by speaking out against, and refusing to join, the teachers' union. He also claims the union discriminated against him in its representation of him because he was not a union member and that the respondent school district is somehow responsible for this alleged discrimination. (See Petition for Writ of Certiorari, pp. 3, 17.) Petitioner's argument is fatally flawed, because he never raised these claims in either his petition, briefs, or testimony to the Tenure Commission, or in his motion for rehearing to the Tenure Commission. These claims were therefore never decided by either the Tenure Commission or any of the courts below. (See Mr.

Bush's Petition to the Tenure Commission dated October 29, 1987, included as Appendix A to this brief.)

This Court generally refrains from addressing issues not asserted or passed upon in the lower courts. *U.S. v. Williams*, ___ U.S. ___, 112 S.Ct. 1735, 1738-39 (1992); *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S.Ct. 1678, 1681 (1986). There is no reason to deviate from this practice here, particularly since there is simply no record on which this Court could consider these claims. The Court would have nothing other than Mr. Bush's rambling speculation on which to render an opinion.

Certainly if Mr. Bush believed that the respondent school district had taken any action against him in 1981 because of his exercise of First Amendment rights, he and his attorneys had an obligation to raise that claim before coming to this Court over ten years later. They did not. Similarly, if Mr. Bush felt the teachers' union had unfairly represented him in these proceedings or in any matter, he could have pursued those claims against the union in any number of administrative or judicial forums. He did not. He should not now be allowed to raise those claims solely in a transparent effort to concoct some basis for seeking this Court's jurisdiction.

IV. PETITIONER WAS NOT DEPRIVED OF PROCEDURAL DUE PROCESS, A CLAIM WHICH HE HAS FAILED TO PRESERVE IN ANY EVENT.

At pages 29-30 of his petition to this Court, petitioner cites quotations from the case of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985), *on remand*,

763 F.2d 202 (6th Cir. 1985), *on remand*, 651 F. Supp. 92 (N.D. Ohio 1986), *aff'd*, 844 F.2d 304 (6th Cir. 1988), *cert. den.*, 488 U.S. 946, 109 S.Ct. 377 (1988), but he does not expressly claim that he was deprived of procedural due process. If he is asserting such a claim, it is without merit. First, petitioner failed to raise a claim of lack of procedural due process to any of the courts below. (He did raise it in his petition to the Tenure Commission, but that was prior to his receiving the full evidentiary hearing.) This Court should therefore not consider this claim for that reason alone.

Second, to the extent *Loudermill* even applies to this case,[3] Mr. Bush has received all the due process to which he is entitled. In *Loudermill*, this Court held that when a public employer seeks to discharge an employee who has a property interest in continued employment, procedural due process requires the employer to provide notice and an opportunity to be heard "at a meaningful time and in a

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[3] *Loudermill* is distinguishable because it was a discharge for misconduct case. Here Mr. Bush was laid off after he refused to take a three-fifths position resulting from declining enrollment. The extent of a property interest in public employment is determined by state law. *Bishop v. Wood*, 426 U.S. 341, 345, 96 S. Ct. 2074, 2077 (1976). Although Mr. Bush was a tenured teacher, the Michigan tenure law which creates the property interest clearly provides that in a layoff situation, there is no right to a pre-termination hearing. M.C.L. 38.105; *Goodwin v. Board of Education*, 82 Mich. App. 559, 267 N.W.2d 142 (1978); *Steeby v. School Dist. of Highland Park*, 56 Mich. App. 395, 224 N.W.2d 97 (1974). Thus, the property interest in a Michigan public school teaching position is not so expansive that it includes a pre-layoff hearing, and *Loudermill* is inapplicable.

meaningful manner," which is generally before the deprivation occurs. *Id.* at 533, 105 S.Ct. at 1488 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 1191 (1965)). The essential elements of a *Loudermill* hearing are "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. at 546, 105 S.Ct. at 1495. The *Loudermill* court indicated that the pre-termination hearing could be merely a "right-of-reply" hearing as a check against mistaken decisions. 470 U.S. at 545, 105 S.Ct. at 1495.

Courts construing the *Loudermill* holding have required only the barest of a pre-termination procedure, especially when an elaborate post-termination procedure is available. *See, e.g., Guris v. McFaul*, 801 F.2d 225, 227-28 (6th Cir. 1986), *appeal after remand*, 844 F.2d 789 (6th Cir. 1988) (indicating that an interview prior to termination by one not the decision-maker is adequate); *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1068-69 (6th Cir. 1984) (all that is required is an "abbreviated opportunity to respond," and a letter informing one of the charges and a meeting to explain them was sufficient); *Duchesne v. Williams*, 849 F.2d 1004, 1005 (6th Cir. 1988), *cert. den.*, 489 U.S. 1081, 109 S.Ct. 1535 (1989) (the "hearing" could be before the supervisor initiating the employment action).

In this case petitioner's pre-termination constitutional due process rights were fully protected. It is undisputed that Mr. Bush received oral and written notice of his impending layoff and was advised of the reasons for it (declining enrollment). Mr. Bush corresponded with the school district about the layoff and recall situation, and it

was Mr. Bush, after all, who chose to reject the three-fifths position. It is also undisputed that the teachers' union grieved Mr. Bush's layoff on his behalf before the start of the 1981-82 school year, taking it through two steps of the grievance process. Although that grievance was withdrawn for lack of grounds prior to reaching arbitration, the internal grievance process itself fully satisfies the minimal requirements of *Loudermill*. To require any greater procedural rights prior to a layoff would cause serious harm to a public school district. As indicated in note 3 above, Michigan law does not so require.

Furthermore, the sufficiency of the pre-layoff procedures here is even more pronounced in light of the extensive post-layoff procedures which were available to and in fact utilized by petitioner, the existence of which is extremely significant in analyzing a deprivation of procedural due process claim. *See Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 3203 (1984), *on remand*, 744 F.2d 22 (4th Cir. 1984). Here, petitioner always had available to him and in fact requested and received a Tenure Commission evidentiary hearing which gave him full opportunity to challenge the grounds for his 1981-82 layoff, with appeal rights or opportunities to three different state courts: the Ottawa County Circuit Court, the Michigan Court of Appeals and the Michigan Supreme Court. In addition, he had the right to, and on two subsequent occasions utilized, the union grievance procedure, which provided for binding arbitration.

For all of these reasons any claim petitioner makes for lack of procedural due process is without merit.

V. MICHIGAN LAW REQUIRED THAT THE TENURE COMMISSION DECISION BE REVERSED. THE CIRCUIT COURT COMMITTED NO ERROR IN DOING SO.

Petitioner argues that the Ottawa County Circuit Court committed errors of law in reversing the Tenure Commission majority decision. Petitioner is wrong. The Tenure Commission majority decision was so erroneous as a matter of well established Michigan law that it could not stand, and the circuit court was totally correct in reversing the Tenure Commission decision on appeal. Both the Michigan Court of Appeals and the Michigan Supreme Court correctly found no reason to review the circuit court's decision, and there is no legitimate basis for this Court to now review the Michigan courts.

The legal errors contained in the Tenure Commission's decision which required its reversal include the following:

1. Michigan law requires that an adjudicatory decision of an administrative agency like the Tenure Commission must be based on competent, material, and substantial evidence on the whole record. M.C.L. 24.306(1)(d). If it is not, the decision must be reversed. *Board of Education for Garden City v. Brisbois*, 164 Mich. App. 74, 417 N.W.2d 84 (1987), *app. den.*, 429 Mich. 897 (1988). Here there was simply no evidence of subterfuge or course manipulation whatsoever, and the circuit court could have correctly reversed for that reason alone.

2. The school district met its burden to show a legitimate basis for the position reduction and resulting layoff by the undisputed evidence of the substantial (25%) decline in industrial arts student enrollment. Under Michigan tenure law, the burden was then on Mr. Bush, not the school district, to prove bad faith or subterfuge. *Maine v. Melvindale-Northern Allen Park Public Schools*, TTC 85-7, pp. 7-8. He could not and did not do so.

3. The Tenure Commission improperly interpreted the collective bargaining agreement to require the school district to remove incumbent, qualified, and tenured 7th and 8th grade teachers and replace them with Mr. Bush, solely because of his seniority, even though he was *unqualified* for any of those positions. This decision was erroneous because it ignored established principles of Michigan law governing contract interpretation, *Stark v. Budwarker, Inc.*, 25 Mich. App. 305, 314-315, 181 N.W.2d 298 (1970); *Detroit Greyhound Employees Federal Credit Union v. Aetna Life Ins. Co.*, 381 Mich. 683, 167 N.W.2d 274 (1969), and was an unlawful attempt by the Tenure Commission to redefine job qualifications, a decision reserved to local boards of education. *Chester v. Harper Woods School District*, 87 Mich. App. 235, 245, 273 N.W.2d 916 (1978).

4. The Tenure Commission decision improperly required the respondent school district to manipulate course offerings and schedules to favor Mr. Bush, but under established Michigan tenure law a school district has no obligation to do so. *Wogerman v. Branch Intermediate School District*, TTC 81-42; *Valesano v.*

White Pine School District, TTC 78-47; *Maciak v. Center Line Public Schools*, TTC 78-18; *Hadacz and Kukura v. Northwest Bd. of Educ.*, TTC 83-36.

5. The Tenure Commission erred in relying on substantially later events to attempt to establish bad faith in 1981. There was no competent, substantial, or material evidence on the whole record to support a finding that those events indicated bad faith when they occurred, let alone several years earlier, and the circuit court properly so found.

The circuit court's decision reversing the Tenure Commission decision was completely proper and fully in accord with Michigan law.

CONCLUSION

For the reasons set forth above, petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

PETITION BEFORE THE MICHIGAN TENURE COMMISSION

STATE OF MICHIGAN STATE
TENURE COMMISSION

GERALD BUSH,

Appellant,

vs. Docket No. 87-30

BOARD OF EDUCATION
OF THE ZEELAND
PUBLIC SCHOOLS,

Appellee.

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PETITION

Gerald Bush, the above-named Appellant, by his attorneys, Foster, Swift, Collins & Coey, P.C., hereby petitions for a hearing and appeals the decisions of Appellee Board, and as a basis alleges as follows:

I. FACTS

1. Appellant Gerald Bush (hereinafter referred to as "Bush") is a "certificated" "teacher" within the meaning of Sections 1 and 2 of Article I of the Michigan Teacher Tenure Act. His address is 724 East Central, Zeeland, Michigan 49464.

2. Appellee Board of Education of the Zeeland Public Schools (hereinafter referred to as the "Board") is a "controlling board" within the meaning of Section 3 of Article I of the Michigan Teacher Tenure Act. Its address is P.O. Box 110, Zeeland, Michigan 49464.

3. At the commencement of the 1971-72 school year and continuously to date Bush has had tenure status in Appellee School District.

4. Bush commenced employment with the Board on September 2, 1969, and through the 1980-81 school year taught classes exclusively in the industrial arts area.

5. In March or April 1981, Bush was verbally notified by the high school principal that his hours would be reduced from five-fifths to three-fifths because he was lowest in seniority in the Industrial Arts Department. Thereafter, in June 1981, Bush received written notice from the Board that his teaching hours would be reduced from five to three classes per day. After such action was questioned, the Board laid off Bush and concurrently offered to him a three-fifths position. Bush rejected the position because it was less than full-time. He maintained his rights to be recalled, and the Board acknowledged such by placing him on the recall list.

6. At the commencement of the 1982-83 school year, the Board had an opening in a four-fifths position in the industrial arts area for which Bush was certified, qualified and had previously held. It failed to offer Bush the position.

7. At the commencement of the 1983-84 school year, the Board had an opening in a full-time position in the industrial arts area for which Bush was certified, qualified and had previously held. But, Bush took a sabbatical leave during the 1983-84 school year pursuant to the terms of a settlement agreement between he and the Board dated August 26, 1983. The settlement agreement was the result of an arbitration award rendered against the Board in favor of Bush concerning its failure to offer him the part-time position for the 1982-83 school year referred to in paragraph 6 above. Bush contends the agreement provided for his return to active employment at the commencement of the 1984-85 school year. The Board denied such and failed to reemploy Bush for the 1984-85 school year but acknowledged he remained on the recall list.

8. At the commencement of the 1986-87 school year, the Board had another opening, a full-time position in the industrial arts area for which Bush was certified, qualified and had previously held. It failed to offer Bush the position. On November 24, 1986, Bush returned to active employment with the District on a full-time basis in an alternative education position, for which Bush was certified and qualified, pursuant to a settlement agreement between Bush and the Board with respect to a grievance he had filed regarding his failure to be recalled for the 1986-87 school year. The agreement provided Bush's

return and did not constitute an admission by the Board for any purpose or a waiver by Bush of any of his rights under the Tenure Act.

9. During and since the 1981-82 school year the Board has employed probationary and/or lower seniority teachers in positions for which Bush was both certified and qualified.

10. Immediately prior to the 1981-82 school year and since the Board, through certain of its administrators, has engaged in a manipulation of course offerings, class schedules and teacher assignments so as to place itself in the position of being purportedly unable to offer Bush a position for which he was certified and qualified. This manipulation of course offerings, schedules and assignments was done without a legitimate educational basis, arbitrarily, capriciously and in bad faith as a result in part of the animus which certain administrators had for Bush. As a result, Bush was constructively demoted and discharged without reasonable and just cause under the guise of a reduction in personnel.

11. The Board has never provided to Bush notice of his tenure rights. Nor has the Board provided to Bush any of the protections required under Article IV of the Act, including, but not limited to, charges, notice and the opportunity for a due process hearing. —

II. ASSIGNMENT OF ERROR

Appellee Board of Education has erred in that:

1. During and since the 1981-82 school year it has failed to recall Bush to vacancies held by probationary

teachers and/or for which he was certified and qualified in violation of his rights under Section 5 of Article IV of the Act.

2. Since the commencement of the 1981-82 school year it has constructively demoted and discharged Bush under the guise of necessary reductions in personnel by manipulating course offerings, class schedules and teacher assignments without a legitimate educational basis, arbitrarily, capriciously and in bad faith. The Board had no reasonable and just cause to demote or discharge Bush and did so without charges, notice and a hearing, all of which is in violation of his rights under Article IV of the Act.

III. RELIEF

WHEREFORE, Appellant Gerald Bush respectfully requests that this Commission:

1. Hold a private hearing on this appeal within sixty (60) days pursuant to Section 1 of Article VI of the Act.

2. Find that the assignments of error as set forth in Section II are valid.

3. Reinstate Bush to full-time active employment with the Board in an industrial arts position for which he is certified and qualified, ordering the Board to grant Bush full back pay and economic benefits, plus interest, and all those other rights, privileges and benefits of employment which would have accrued to him to date had he not been wrongfully constructively demoted and

discharged since the commencement of the 1981-82 school year through November 24, 1986.

4. Grant to Bush his costs, expenses and reasonable attorneys' fees incurred in prosecuting this action.

5. Grant such other relief and issue such affirmative orders as this Commission deems is just, equitable and required to effectuate the purposes and policies of the Michigan Teacher Tenure Act.

Respectfully submitted,
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COEY, P.C.
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Dated: 10/29/87

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